16A Am. Jur. 2d Constitutional Law § 495

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law
Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(3) Who is Protected

(c) The Press

§ 495. Regulation of press, generally; regulation as business; free press as guardian of public interest

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2070 to 2081

The free press is the guardian of the public interest.[1] The First Amendment protects a newspaper itself from claims related to publication decisions and grants it a virtually unfettered right to choose what to print and what not to.[2] The First Amendment does not just protect a news outlet's editorial perspective or the way its beat reporters cover a given campaign or policy initiative; rather, because the integrity of the newsroom does not readily permit mandated interaction with the government, the First Amendment applies in full force to all news, comment, and advertising.[3] The constitutional guarantee of a free press assures the maintenance of the political system and an open society, and secures the paramount public interest in a free flow of information to the people concerning public officials.[4]

However, the press does not possess any immunities not shared by every individual;[5] the publisher of a newspaper has no special privilege to invade the rights and liberties of others, and a publisher must answer for libel and may be punished for contempt of court.[6] Moreover, the press, to the extent that it is a business activity, is not immunized from all regulation to

which other business activities are subject.[7] Profit motive is entirely irrelevant to the determination of a news organization's First Amendment rights.[8]

The enforcement of general laws against the press is not, under the First Amendment, subject to stricter scrutiny than would be applied to enforcement against other persons or organizations.[9]

The First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability; otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.[10] Like others, newspaper publishers are subject to the antitrust laws[11] as well as to federal labor laws,[12] and they must pay equitable and nondiscriminatory taxes on their business.[13] However, any state compulsion to publish that which reason tells a newspaper publisher should not be published is unconstitutional.[14]

Observation:

A state statute barring the placing of liquor advertisements in newspapers "published by, for or in behalf of any educational institution" is not unconstitutional as imposing a selective tax or other financial burden on newspapers because of their content.[15]

Footnotes

1 Courthouse News Service v. Planet, 947 F.3d 581 (9th Cir. 2020).
Courts have a duty to conduct a thorough and searching review of any attempt to restrict public access to observe government activities; if a government agency restricts public access, the media's only recourse is the court system because the free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press. Leigh v. Salazar, 677 F.3d 892 (9th Cir. 2012).

2 Rall v. Tribune 365, LLC, 43 Cal. App. 5th 638, 256 Cal. Rptr. 3d 775 (2d Dist. 2019), review filed, (Jan. 27, 2020).

3 Washington Post v. McManus, 944 F.3d 506 (4th Cir. 2019).

4 PG Pub. Co. v. Aichele, 705 F.3d 91 (3d Cir. 2013).

5 Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954).
As to regulation of newspapers, magazines and other periodicals, see Am. Jur. 2d, Newspapers, Periodicals, and Press Associations §§ 22, 23
As to nonimmunity of press associations from regulation, see Am. Jur. 2d, Newspapers, Periodicals, and Press Associations § 54.

6 Am. Jur. 2d, Newspapers, Periodicals, and Press Associations § 23.

7 Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).

8 Courthouse News Service v. Planet, 947 F.3d 581 (9th Cir. 2020).

9 Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).

10 Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).

Generally, as to the constitutionality of statutes regulating newspapers, see Am. Jur. 2d, Newspapers, Periodicals, and Press Associations §§ 24 to 29.

11 Am. Jur. 2d, Newspapers, Periodicals, and Press Associations §§ 57 to 77.

12 Am. Jur. 2d, Labor and Labor Relations § 591.

13 Am. Jur. 2d, Newspapers, Periodicals, and Press Associations § 30.

14 Mehdi v. Commission on Human Rights and Opportunities, 144 Conn. App. 861, 74 A.3d 493 (2013).

15 The Pitt News v. Fisher, 215 F.3d 354, 145 Ed. Law Rep. 173 (3d Cir. 2000).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(3) Who is Protected

(c) The Press

§ 496. Right of press to gather news or information

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1551, 2070

Although the rights granted to the press and embodied in the First Amendment are not absolute,[1] nevertheless the First Amendment provides at least some protection for news agencies' efforts to gather news,[2] and it protects their right to receive protected speech.[3] However, even the great general interest in an unfettered press may at times be outweighed by other great societal interests,[4] and, therefore, the press is not immune from restrictions or regulations.[5] The right of the press to speak and publish does not carry with it the unrestrained right to gather information.[6]

Footnotes

1 Telemundo of Los Angeles v. City of Los Angeles, 283 F. Supp. 2d 1095 (C.D. Cal. 2003).

2 American Civil Liberties Union of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012).

3 Davis v. East Baton Rouge Parish School Bd., 78 F.3d 920, 107 Ed. Law Rep. 540 (5th Cir. 1996).

4 Briscoe v. Reader's Digest Association, Inc., 4 Cal. 3d 529, 93 Cal. Rptr. 866, 483 P.2d 34, 57 A.L.R.3d 1 (1971) (overruled on other grounds by, Gates v. Discovery Communications, Inc., 34 Cal. 4th 679, 21 Cal. Rptr. 3d 663, 101 P.3d 552 (2004)).

5 As to application to the press of regulations to which other business activities are subject, see § 495.

6 Pell v. Procunier, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974); Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972); In re Attorney General's "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups," issued July 18, 2007, 200 N.J. 283, 981 A.2d 64 (2009).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(3) Who is Protected

(c) The Press

§ 497. Press access to information

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2077, 2078

A.L.R. Library

Propriety and Scope of Protective Order Against Disclosure of Material Already Entered into Evidence in Federal Court Trial, 138 A.L.R. Fed. 153

Right of access to Federal District Court guilty plea proceeding or records pertaining to entry or acceptance of guilty plea in criminal prosecution, 118 A.L.R. Fed. 621

Right of press, in criminal proceeding, to have access to exhibits, transcripts, testimony, and communications not admitted in evidence or made part of public record, 39 A.L.R. Fed. 871

The free press is the guardian of the public interest.[1] The First Amendment right to gather news is not absolute,[2] While news gathering has some First Amendment protection,[3] its protection does not necessarily include a right to access all news-worthy

information.[4] The First Amendment does not guarantee to the press a constitutional right of special access to information or places not available to the general public.[5] News people have no constitutional right of access to prisons or their inmates beyond that afforded to the general public.[6] Similarly, with respect to emergency situations, news people have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.[7] Moreover, as a matter of law, the First Amendment right of access to public information does not extend to physical access to a videotape of a sitting United States President's deposition testimony that was offered in a trial in an underlying criminal case where members of the public, including the press, have been given access to information contained in the videotape, and received all of the information to which they are entitled under the First Amendment.[8] Also, the First Amendment rights to freedom of speech and of the press do not create a per se right of access to government property or activities simply because such access might lead to more thorough or better reporting.[9] Likewise, a state statute restricting access to police accident reports is not facially overbroad, in violation of the First Amendment, where there is no threat of prosecution for violation and no restriction of expressive speech.[10]

However, an association of journalists and media professionals stated a First Amendment claim against the President for retaliatory acts that punished free speech by revoking or threatening to revoke members' security clearances where the association alleged that the President only began considering whether to revoke clearances after several members who were former government officials spoke out critically about him, alleging that the President's motivation was to punish officials' past speech and to deter their media speech going forward, resulting in injury to the association's right to receive information.[11]

The First Amendment does not guarantee to the press the right to be "embedded" with military units, that is, the right to travel with those units in combat operations, and to be accommodated and otherwise facilitated by the military in their reporting efforts from the battlefield.[12]

The First Amendment does not permit the press to break and enter an office or dwelling to gather news with impunity, relieve a newspaper reporter of an obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation even though the reporter might be required to reveal a confidential source, permit the press to publish copyrighted materials without obeying the copyright laws, relieve the media of its obligation to obey the National Labor Relations Act and the Fair Labor Standards Act, permit a restraint of trade in violation of the antitrust laws, or relieve the media of an obligation to pay nondiscriminatory taxes.[13]

Where a city was acting in its governmental capacity rather than proprietary capacity with respect to public property in connection with the official ceremony portion of a celebration commemorating the beginning of the Mexican War of Independence against colonial Spain, the city's denial of equal access to a television broadcast corporation to broadcast the ceremony infringes upon the corporation's First Amendment free speech rights where the official ceremony featured city officials, and the city declared the celebration a special event sponsored by the city.[14]

Footnotes

1 Courthouse News Service v. Planet, 947 F.3d 581 (9th Cir. 2020).
Courts have a duty to conduct a thorough and searching review of any attempt to restrict public access to observe government activities; if a government agency restricts public access, the media's only recourse is the court system because the free press is the guardian of the public interest, and the independent judiciary is the guardian of the free press. Leigh v. Salazar, 677 F.3d 892 (9th Cir. 2012).

2 Davis v. East Baton Rouge Parish School Bd., 78 F.3d 920, 107 Ed. Law Rep. 540 (5th Cir. 1996).

3 § 496.

4 Mocek v. City of Albuquerque, 3 F. Supp. 3d 1002 (D.N.M. 2014), aff'd, 813 F.3d 912 (10th Cir. 2015).

5 Houchins v. KQED, Inc., 438 U.S. 1, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978); Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978); Project Veritas v. Ohio Election Commission, 418 F. Supp. 3d 232 (S.D. Ohio 2019); Jenni Rivera Enterprises, LLC v. Latin World Entertainment Holdings, Inc., 36 Cal. App. 5th 766, 249 Cal. Rptr. 3d 122 (2d Dist. 2019).

6 Houchins v. KQED, Inc., 438 U.S. 1, 98 S. Ct. 2588, 57 L. Ed. 2d 553 (1978).

7 Nicholas v. Bratton, 376 F. Supp. 3d 232 (S.D. N.Y. 2019).

8 U.S. v. McDougal, 103 F.3d 651 (8th Cir. 1996).

9 JB Pictures, Inc. v. Department of Defense, 86 F.3d 236 (D.C. Cir. 1996).

10 Amelkin v. McClure, 205 F.3d 293, 2000 FED App. 0066P (6th Cir. 2000).

11 Pen American Center, Inc. v. Trump, 2020 WL 1434573 (S.D. N.Y. 2020).

12 Flynt v. Rumsfeld, 355 F.3d 697 (D.C. Cir. 2004).

13 Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).

14 Telemundo of Los Angeles v. City of Los Angeles, 283 F. Supp. 2d 1095 (C.D. Cal. 2003).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(3) Who is Protected

(c) The Press

§ 498. First Amendment as affecting press's violation of laws relating to crime or criminal proceedings

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2100 to 2118

A.L.R. Library

Right of access to Federal District Court guilty plea proceeding or records pertaining to entry or acceptance of guilty plea in criminal prosecution, 118 A.L.R. Fed. 621

The First Amendment does not confer a license, in the interest of securing news or otherwise, on either the reporter or his or her news sources to violate otherwise valid criminal laws.[1] The First Amendment is not a license to trespass or to intrude by electronic means into the sanctity of another's home or office and does not become such a license simply because the person subjected to the intrusion is reasonably suspected of committing a crime.[2]

As a general principle, the First Amendment bars the government from dictating what can be seen, read, spoken, or heard; however, not all words are entitled to the protection of the First Amendment, and the weight of authorities permits the state to prohibit the solicitation of a crime.[3] Moreover, the First Amendment allows the evidentiary use of speech to establish the elements of a crime or to prove motive or intent.[4]

The First Amendment does not afford journalists a constitutional right to conceal their confidential sources from grand jury subpoenas.[5] Indeed, a journalist has no First Amendment privilege to refuse to disclose the identity of a "confidential source" where that information is relevant to a legitimate criminal investigation.[6] In criminal cases, any impact that the disclosure of a journalist's confidential information would likely have on the free flow of information generally is outweighed by the strong public interest in investigating crimes and prosecuting the perpetrators as well as a defendant's right to a fair trial and to obtain information relevant to a defense.[7] The First Amendment does not exempt a reporter from being compelled to reveal the identity of the source from whom he or she obtained a videotape that is the subject of a protective order in a pending criminal case, where the information is relevant and a part of a special investigator's good-faith contempt investigation, the information appears to provide only the means for determining who, if anyone, should be charged with contempt, and the burden on the free flow of information would be limited, since the confidential source appeared to be implicated in a criminal act and might have provided the tape even if confidentiality was not granted.[8] Likewise, neither a state reporter's "shield law" nor the First Amendment will protect a reporter against a subpoena requiring the reporter and the newspaper company to produce certain documents to be used for the purpose of cross-examining prosecution witnesses in a state murder trial where the trial judge has certified that the documents are necessary and material for the defendant and has stated that when the documents are produced, he would afford the newspaper company and the reporter a full hearing on their claims that the subpoena was illegal.[9]

By virtue of the First Amendment, the press receives a qualified right of access to most criminal proceedings. To determine whether a particular proceeding should be made public pursuant to the First Amendment, the court should first evaluate whether the qualified right of access attaches to the proceeding, which involves consideration of two complementary concerns—whether the place and proceeding in question has historically been open to the press and public and whether the public access plays a significant positive role in the functioning of the particular process in question. If the qualified right attaches, the presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.[10] On the other hand, press organizations do not have a First Amendment right of access to district court proceedings ancillary to a grand jury investigation of whether violations of federal law occurred in relation to the witnesses or others associated with a civil case against the President, even insofar as such proceedings do not involve "matters occurring before the grand jury" within the meaning of the grand jury secrecy rule, since conducting ancillary proceedings without referring to grand jury matters would create enormous practical problems, no strong history or tradition supported doing so, and, although assertions of executive privilege are matters of intense public interest, there was no trend toward open ancillary hearings dealing with executive privilege in a grand jury context.[11]

The First Amendment does not guarantee a presumption of openness and access to juvenile proceedings and the records generated pursuant thereto; nevertheless, an across-the-board ban on access to juvenile proceedings poses a substantial constitutional issue.[12] Moreover, the public and the press generally have a qualified constitutional right to attend criminal trials as well as posttrial proceedings.[13] Indeed, in the case of proceedings that are traditionally open to the public and are enhanced by public access, such as criminal trials, the public and the press have a constitutional right to access unless denial of access is necessitated by an overriding governmental interest and is narrowly tailored to serve that interest.[14]

Members of the press have no constitutional right, independent of an accused's public-trial right under the Sixth and 14th Amendments, to insist upon access to a pretrial judicial proceeding in a criminal case and hence cannot require the opening of such a proceeding to them where the accused, the prosecutor, and the trial judge have all agreed to the closure of the proceeding

in order to ensure a fair trial.[15] Also, the First Amendment right of access of the press does not attach to a summary jury trial ordered to facilitate the settlement of a class action arising from riots that occurred at a correctional facility.[16]

The policy of a state department of corrections, restricting access to newspapers, magazines, and photographs by inmates placed in the most restrictive level of the prison's long-term segregation unit, is justified by the need to provide particularly difficult prisoners with increased incentives for better prison behavior, and the policy does not violate the First Amendment rights of such prisoners.[17] A Bureau of Prisons regulation prohibiting photographic, audio, and visual recording devices at federal executions is deemed reasonably related to legitimate penological interests, and an Internet content provider's First Amendment rights are not violated when it was prevented from transmitting a live broadcast from the maximum security prison of the execution of a defendant convicted of bombing a federal building.[18]

An order preventing the publication, during the pendency of the trial, of the names of jurors disclosed in open court infringes upon the First Amendment freedom of the press to publish information disclosed in an open courtroom, where there are no exceptional circumstances that could justify departure from the doctrine barring restrictions on the publication of information revealed in open court.[19] Likewise, a law imposing sanctions upon the publication of the name of a rape victim obtained from official court records open to the public is violative of the constitutional protection of free press.[20] Also, a state statute making it a crime for a newspaper to publish, without the written approval of a juvenile court, lawfully obtained, truthful information identifying by name a youth charged as a juvenile offender violates the First and 14th Amendments, there being no justification for the imposition of criminal sanctions for the publication of a juvenile's name that has been lawfully obtained in any state interest in protecting the anonymity of juvenile offenders to further their rehabilitation.[21]

A journalist charged with violating the Protection of Children Against Sexual Exploitation Act cannot assert as a defense that he or she is entitled under the First Amendment to trade in child pornography to create a work of journalism.[22]

Where a member of the press is alleged to have circulated damaging falsehoods and is sued for injury to a plaintiff's reputation, the plaintiff is not barred because of any absolute privilege for the editorial processes of a media defendant—under the First Amendment's guarantees of freedom of speech and freedom of the press—from inquiring into the editorial processes of those responsible for the alleged defamatory material, where such inquiry will produce evidence material to the proof of a critical element of the plaintiff's case.[23]

The premises of a newspaper may be searched pursuant to a properly issued warrant.[24] However, search warrant applications have not historically been open to the press and public as would argue in favor of a finding that a First Amendment right of public access exists with respect to such applications.[25]

Footnotes

1 Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972); Galella v. Onassis, 487 F.2d 986, 17 Fed. R. Serv. 2d 1205, 28 A.L.R. Fed. 879 (2d Cir. 1973).

2 Shevin v. Sunbeam Television Corp., 351 So. 2d 723 (Fla. 1977).

3 Podracky v. Commonwealth, 52 Va. App. 130, 662 S.E.2d 81 (2008).

4 Whitaker v. Thompson, 353 F.3d 947 (D.C. Cir. 2004); People v. Lindberg, 45 Cal. 4th 1, 82 Cal. Rptr. 3d 323, 190 P.3d 664 (2008).

5 In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006).

6 In re Special Proceedings, 291 F. Supp. 2d 44 (D.R.I. 2003), aff'd, 373 F.3d 37, 64 Fed. R. Evid. Serv. 768 (1st Cir. 2004).

7 In re Special Proceedings, 291 F. Supp. 2d 44 (D.R.I. 2003), aff'd, 373 F.3d 37, 64 Fed. R. Evid. Serv. 768 (1st Cir. 2004).

8 In re Special Proceedings, 291 F. Supp. 2d 44 (D.R.I. 2003), aff'd, 373 F.3d 37, 64 Fed. R. Evid. Serv. 768 (1st Cir. 2004).

9 New York Times Co. v. Jascalevich, 439 U.S. 1301, 98 S. Ct. 3058, 58 L. Ed. 2d 9 (1978).

10 In re Grand Jury Subpoena, 103 F.3d 234 (2d Cir. 1996) (holding that the press had no right to access secret grand jury proceedings).

11 In re Motions of Dow Jones & Co., 142 F.3d 496 (D.C. Cir. 1998).

12 World Pub. Co. v. White, 2001 OK 48, 32 P.3d 835 (Okla. 2001).

13 U.S. v. Osborne, 68 F.3d 94 (5th Cir. 1995); U.S. v. Ellis, 90 F.3d 447 (11th Cir. 1996).

14 JB Pictures, Inc. v. Department of Defense, 86 F.3d 236 (D.C. Cir. 1996).

15 Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979).

16 In re Cincinnati Enquirer, a Div. of Gannett Satellite Information, Inc., 94 F.3d 198, 36 Fed. R. Serv. 3d 390, 1996 FED App. 0271P (6th Cir. 1996).

17 Beard v. Banks, 548 U.S. 521, 126 S. Ct. 2572, 165 L. Ed. 2d 697 (2006).

18 Entertainment Network, Inc. v. Lappin, 134 F. Supp. 2d 1002 (S.D. Ind. 2001).

19 U.S. v. Quattrone, 402 F.3d 304 (2d Cir. 2005).

20 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975).

21 Smith v. Daily Mail Pub. Co., 443 U.S. 97, 99 S. Ct. 2667, 61 L. Ed. 2d 399 (1979).

22 U.S. v. Matthews, 209 F.3d 338 (4th Cir. 2000).

23 Herbert v. Lando, 441 U.S. 153, 99 S. Ct. 1635, 60 L. Ed. 2d 115, 3 Fed. R. Evid. Serv. 822, 27 Fed. R. Serv. 2d 1 (1979).

24 Zurcher v. Stanford Daily, 436 U.S. 547, 98 S. Ct. 1970, 56 L. Ed. 2d 525 (1978).

25 In re 3628 V Street, 262 Neb. 77, 628 N.W.2d 272 (2001).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(4) Commercial Speech and Advertising

(a) In General

§ 499. Commercial speech, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1535 to 1541

The First Amendment, as applied to the states through the 14th Amendment, protects commercial speech[1] and marketing[2] from unwarranted governmental regulation.[3]

For First Amendment purposes, "commercial speech" is speech that does no more than propose a commercial transaction.[4] Commercial speech is an expression related solely to the economic interests of the speaker and its audience,[5] generally in the form of commercial advertisement for the sale of goods and services.[6] The mere presence of noncommercial information in an otherwise commercial presentation does not transform the communication into fully protected speech.[7] Moreover, the absence of the speaker's economic motivation does not preclude classification of the speech as commercial for purposes of First Amendment analysis.[8]

Commercial speech enjoys a more limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is subject to modes of regulation that might be impermissible in the realm of noncommercial expression.[9] Under the two-part test for assessing restrictions on commercial speech, the first question to ask is whether the

challenged speech restriction is content-based, speaker-based, or both, and if the restriction is content-based or speaker-based, then it is subject to heightened scrutiny under the First Amendment.[10] The government's legitimate interest in protecting consumers from commercial harms explains why commercial speech can be subject to greater governmental regulation than noncommercial speech.[11] In other words, commercial speech is entitled to the protection of the First Amendment, but the protection afforded commercial speech is somewhat less extensive than that afforded noncommercial speech.[12] To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the First Amendment's guarantee with regard to noncommercial speech.[13] Also, although commercial speech is generally entitled to less protection under the First Amendment than other forms of speech,[14] it nonetheless has a claim to safekeeping from unwarranted government intrusion.[15] While political speech lies at the core of First Amendment protections, those protections also embrace commercial speech, including advertising.[16]

The Supreme Court allows room for legislative judgments within the bounds of the general protection provided by the Constitution to commercial speech.[17] However, even assuming that a flat ban on commercial solicitation can be regarded as a content-neutral time, place, or manner restriction on speech, a challenged restriction of that type still must serve a substantial state interest in a direct and effective way under the First Amendment.[18]

Under the First Amendment, commercial speech cannot be banned because of an unsubstantiated belief that its impact is detrimental on the general populace,[19] nor is the mere possibility that some members of the population may find particular advertising embarrassing or offensive a sufficient justification for suppressing it.[20]

Certainly, not all regulation of commercial speech is unconstitutional, but the party seeking to uphold a restriction on commercial speech carries the burden of justifying it.[21] In defending a First Amendment challenge to restriction on commercial speech, the government bears the burden of identifying a substantial interest directly advanced and justifying the challenged restriction.[22] In establishing that a challenged commercial-speech restriction is not more extensive than necessary to serve the interests that support it, the government is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest, a fit that represents not necessarily the single best disposition but one the scope of which is in proportion to the interest served.[23] A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree;[24] mere speculation or conjecture does not satisfy the burden of justifying a restriction.[25] Consequently, regulation may not be sustained if it provides only ineffective or remote support for the government's purpose.[26]

CUMULATIVE SUPPLEMENT

Cases:

Commercial speech is not inextricably intertwined with noncommercial speech, and thus does not lose its commercial character for First Amendment purposes, if no law of man or of nature makes it impossible to present noncommercial aspects of the speech without the commercial aspects. U.S. Const. Amend. 1. Ariix, LLC v. NutriSearch Corporation, 985 F.3d 1107 (9th Cir. 2021).

[END OF SUPPLEMENT]

Footnotes

1 Bland v. Fessler, 88 F.3d 729 (9th Cir. 1996).

2 Sorrell v. IMS Health Inc., 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

3 Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

4 Harris v. Quinn, 573 U.S. 616, 134 S. Ct. 2618, 189 L. Ed. 2d 620 (2014); Bland v. Fessler, 88 F.3d 729 (9th Cir. 1996); U.S. v. Philip Morris USA Inc., 566 F.3d 1095, 73 Fed. R. Serv. 3d 896 (D.C. Cir. 2009).

5 El Dia, Inc. v. Puerto Rico Dept. of Consumer Affairs, 413 F.3d 110 (1st Cir. 2005); U.S. v. Philip Morris USA Inc., 566 F.3d 1095, 73 Fed. R. Serv. 3d 896 (D.C. Cir. 2009); U.S. v. Bell, 238 F. Supp. 2d 696 (M.D. Pa. 2003), aff'd, 414 F.3d 474 (3d Cir. 2005); Senna v. Florimont, 196 N.J. 469, 958 A.2d 427 (2008).

6 Thompson v. Western States Medical Center, 535 U.S. 357, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002); Board of Trustees of State University of New York v. Fox, 492 U.S. 469, 109 S. Ct. 3028, 106 L. Ed. 2d 388, 54 Ed. Law Rep. 61 (1989); Bad Frog Brewery, Inc. v. New York State Liquor Authority, 134 F.3d 87 (2d Cir. 1998); U.S. v. Bell, 238 F. Supp. 2d 696 (M.D. Pa. 2003), aff'd, 414 F.3d 474 (3d Cir. 2005).

7 IMS Health Inc. v. Sorrell, 630 F.3d 263 (2d Cir. 2010), aff'd, 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

8 Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore, 721 F.3d 264, 85 Fed. R. Serv. 3d 1400 (4th Cir. 2013).

9 U.S. v. Edge Broadcasting Co., 509 U.S. 418, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993); In re Doser, 412 F.3d 1056 (9th Cir. 2005); Valley Broadcasting Co. v. U.S., 107 F.3d 1328 (9th Cir. 1997); Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996).

10 1-800-411-Pain Referral Service, LLC v. Otto, 744 F.3d 1045 (8th Cir. 2014).

11 Sorrell v. IMS Health Inc., 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011).

12 New York State Restaurant Ass'n v. New York City Bd. of Health, 556 F.3d 114 (2d Cir. 2009).

13 Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995).

14 Baker v. City of Iowa City, 867 N.W.2d 44 (Iowa 2015).

15 El Dia, Inc. v. Puerto Rico Dept. of Consumer Affairs, 413 F.3d 110 (1st Cir. 2005).

16 Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc., 227 Ill. 2d 381, 317 Ill. Dec. 855, 882 N.E.2d 1011 (2008).

Commercial speech, including truthful liquor advertising, is entitled to a measure of protection under the First Amendment. Wine and Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36 (1st Cir. 2005).

17 U.S. v. Edge Broadcasting Co., 509 U.S. 418, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993).

18 Matal v. Tam, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017); Edenfield v. Fane, 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993).

19 Linmark Associates, Inc. v. Willingboro Tp., 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977).

20 Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983).

21 Thompson v. Western States Medical Center, 535 U.S. 357, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002).

22 Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161, 164 A.L.R. Fed. 711 (1999).

23 Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161, 164 A.L.R. Fed. 711 (1999).

24 Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161, 164 A.L.R. Fed. 711 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996); Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995); International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996); WV Ass'n of Club Owners and Fraternal Services, Inc. v. Musgrave, 553 F.3d 292 (4th Cir. 2009); Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447 (Tex. 2008).

25 Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995); International Dairy Foods Ass'n v. Amestoy, 92 F.3d 67 (2d Cir. 1996).

26 Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161, 164 A.L.R. Fed. 711 (1999); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996).

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16A Am. Jur. 2d Constitutional Law § 500

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(4) Commercial Speech and Advertising

(a) In General

§ 500. "Intermediate scrutiny test" for restrictions on commercial speech

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1535 to 1541

The Supreme Court engages in an "intermediate scrutiny" of restrictions placed on commercial speech, analyzing them under the framework established in the *Central Hudson case*.[1] Under *Central Hudson*, the government may freely regulate commercial speech that concerns unlawful activity or that is misleading; but commercial speech that neither concerns unlawful activity nor is misleading may be regulated only if the government asserts a substantial interest in support of its regulation, demonstrates that the restriction on commercial speech directly and materially advances that interest, and ensures that the regulation is narrowly drawn.[2] For commercial speech to come within the protection of the First Amendment, it must concern a lawful activity and not be misleading, the governmental interest must be substantial,[3] the regulation must directly advance the governmental interest asserted, and it must be narrowly drawn so as not to be more extensive than is necessary to serve that interest.[4]

A law restricting commercial speech, unlike laws burdening other forms of protected expression, needs only to be tailored in a reasonable manner to serve a substantial state interest in order to survive First Amendment scrutiny, since commercial speech is linked inextricably with the commercial arrangement that it proposes, so that the state's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself.[5]

Footnotes

1 Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980).

2 Matal v. Tam, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996); Valley Broadcasting Co. v. U.S., 107 F.3d 1328 (9th Cir. 1997). Under a First Amendment analysis, a Federal Communications Commission (FCC) order that limits commercial speech need satisfy only intermediate scrutiny. Verizon California, Inc. v. F.C.C., 555 F.3d 270 (D.C. Cir. 2009).

3 Spirit Airlines, Inc. v. U.S. Dept. of Transp., 687 F.3d 403 (D.C. Cir. 2012).

4 Matal v. Tam, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017); Thompson v. Western States Medical Center, 535 U.S. 357, 122 S. Ct. 1497, 152 L. Ed. 2d 563 (2002); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001); Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161, 164 A.L.R. Fed. 711 (1999); El Dia, Inc. v. Puerto Rico Dept. of Consumer Affairs, 413 F.3d 110 (1st Cir. 2005); WV Ass'n of Club Owners and Fraternal Services, Inc. v. Musgrave, 553 F.3d 292 (4th Cir. 2009); Whitaker v. Thompson, 353 F.3d 947 (D.C. Cir. 2004); SKF USA, Inc. v. U.S. Customs and Border Protection, 556 F.3d 1337 (Fed. Cir. 2009); Italian Colors Restaurant v. Harris, 99 F. Supp. 3d 1199 (E.D. Cal. 2015), aff'd, 878 F.3d 1165 (9th Cir. 2018); In re Tobacco Cases II, 41 Cal. 4th 1257, 63 Cal. Rptr. 3d 418, 163 P.3d 106 (2007); Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447 (Tex. 2008).

5 Edenfield v. Fane, 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(4) Commercial Speech and Advertising

(a) In General

§ 501. Requirement that advertising be legal, truthful, and not misleading

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1535, 1539

A.L.R. Library

Power of Federal Trade Commission to issue order requiring corrective advertising, 46 A.L.R. Fed. 905

Only truthful advertising related to lawful activities is entitled to the protection of the First Amendment.[1] In order for commercial speech to be entitled to any First Amendment protection, the speech must first concern a lawful activity and must not be misleading.[2] In the commercial context, a speech concerning unlawful activity is not constitutionally protected.[3] Indeed, offers to engage in illegal transactions are categorically excluded from First Amendment protection.[4] Certainly, the First Amendment does not protect all proposals to engage in commercial transactions, and protection is not accorded at all when the underlying transaction is illegal.[5] The government may ban misleading or deceptive commercial speech, as well as speech that

relates to illegal activity, but when the commercial speech is neither illegal nor misleading, the government's power is more circumscribed.[6]

False or misleading commercial speech receives no protection under the First Amendment.[7] Whether speech is commercial and not entitled to First Amendment protection if it is false depends on whether the speech is an advertisement; the speech refers to a specific product; and the speaker has an economic motivation for the speech.[8] A state may ban altogether commercial expression that is fraudulent, misleading, or deceptive, without further justification.[9] However, where truthful and nonmisleading expression will be snared along with fraudulent or deceptive commercial speech, or advertising is potentially misleading because it may be presented in a way that is not deceptive, the state must demonstrate that the restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end.[10] Although unjustified or unduly burdensome disclosure requirements offend the First Amendment, an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers.[11]

Observation:

Under the commercial speech doctrine, the government's power to regulate commercial transactions justifies its concomitant power to regulate commercial speech that is linked inextricably to those transactions, and the government may require commercial speech to appear in such form or include such additional information, warnings, and disclaimers as are necessary to prevent its being deceptive.[12] However, under the commercial speech doctrine, states may not even place an absolute prohibition on certain types of potentially misleading information if the information may be presented in a way that is not deceptive.[13]

Even when a communication is not misleading, the state retains some authority to regulate it; however, the state must assert a substantial interest and any interference with speech must be in proportion to the interest served.[14]

Because the disclosure of truthful, relevant information is more likely to make a positive contribution to decision making than is concealment of such information, only false, deceptive, or misleading commercial speech may be banned.[15]

Observation:

The rule established by the United States Supreme Court is that when a state regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices or requires disclosure of beneficial consumer information, the purpose of the regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than a strict review; but when a state entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands.[16] Commercial speech regulation may not be sustained if it provides only ineffective or remote support for the government's purpose, and the state bears the burden of showing not merely that the regulation will advance the state's interest but also that it will do so to a material degree.[17]

Footnotes

1 In re R. M. J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982).

2 Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983); Nordyke v. Santa Clara County, 110 F.3d 707 (9th Cir. 1997).

3 North Texas Specialty Physicians v. F.T.C., 528 F.3d 346 (5th Cir. 2008).

4 U.S. v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

5 Nordyke v. Santa Clara County, 110 F.3d 707 (9th Cir. 1997).

6 Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447 (Tex. 2008).

7 U.S. v. Benson, 561 F.3d 718 (7th Cir. 2009).

8 U.S. v. Benson, 561 F.3d 718 (7th Cir. 2009).

9 In re R. M. J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); The Florida Bar v. Gold, 937 So. 2d 652 (Fla. 2006).

10 Edenfield v. Fane, 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985); Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd., 632 F.3d 212 (5th Cir. 2011).

11 Milavetz, Gallop & Milavetz, P.A. v. U.S., 559 U.S. 229, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985).

12 U.S. v. Philip Morris USA Inc., 566 F.3d 1095, 73 Fed. R. Serv. 3d 896 (D.C. Cir. 2009).

13 In re R. M. J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982).

14 In re R. M. J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982).

15 Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy, 512 U.S. 136, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994) (holding that an attorney's use of CPA (certified public accountant) and CFP (certified financial planner) designations in her advertising and other communication with the public was protected "commercial speech" for purposes of the First Amendment).

16 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996).

17 § 499.

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16A Am. Jur. 2d Constitutional Law § 502

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(4) Commercial Speech and Advertising

(a) In General

§ 502. "Reasonable fit" requirement for restrictions on commercial speech

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1535, 1541

The least restrictive means test, as applied to noncommercial speech, has no role in any First Amendment analysis in the commercial speech context. In the commercial speech context, there must be a "fit" between the legislature's ends in regulating speech and the means chosen to accomplish those ends,[1] a fit that is not necessarily perfect, but reasonable, one that represents not necessarily the single best disposition, but one the scope of which is in proportion to the interest served, and one that employs not necessarily the least restrictive means, but a means narrowly tailored to achieve the desired objective.[2] Restrictions on commercial speech are not to be judged on whether they represent the "least-restrictive-means" of achieving a legitimate governmental objective, nor on the basis of whether such restrictions have a "rational basis"; the regulation need not be absolutely the least severe that could achieve the desired end.[3] While unjustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech, an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers.[4]

The government's burden in justifying a restriction on commercial speech is not satisfied by mere speculation or conjecture; instead, the government must demonstrate that the harms it recites are real and substantial.[5] In determining the constitutionality of the regulation of commercial speech that concerns a lawful activity and is not misleading, a court must consider whether the

asserted governmental interest supporting the regulation is substantial and, if so, the court must determine whether the regulation directly advances the governmental interest asserted and whether it is no more extensive than necessary to serve that interest.[6]

Footnotes

1 Sorrell v. IMS Health Inc., 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544, 67 A.L.R.6th 755 (2011); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993) (a city seeking to enforce a ban on news racks dispensing commercial handbills has the burden of establishing a "reasonable fit" between its legitimate interest in safety and esthetics and its choice of means to serve those interests).

2 Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995); Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 36 Fed. R. Serv. 3d 397, 1997 FED App. 0002P (6th Cir. 1997); Valley Broadcasting Co. v. U.S., 107 F.3d 1328 (9th Cir. 1997).

3 City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993).

4 Milavetz, Gallop & Milavetz, P.A. v. U.S., 559 U.S. 229, 130 S. Ct. 1324, 176 L. Ed. 2d 79 (2010); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985).

5 Valley Broadcasting Co. v. U.S., 107 F.3d 1328 (9th Cir. 1997).

6 Rubin v. Coors Brewing Co., 514 U.S. 476, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995); Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy, 512 U.S. 136, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994).

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§ 503. Particular commercial speech or regulation governing commercial speech

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1535 to 1541

In consonance with the general principles governing the First Amendment protection of commercial speech,[1] the courts have held that—

— the Federal Alcohol Administration Act (FAAA) provision prohibiting beer labels from displaying alcohol content violates the First Amendment's protection of commercial speech, although the government has a substantial interest in protecting the health, safety, and welfare of citizens by preventing brewers from competing on the basis of alcohol strength, and the government has an interest in facilitating state efforts to regulate alcohol under the 21st Amendment, where the government offered nothing to suggest that the states were in need of federal assistance, other FAAA provisions and implementing regulations prevented the labeling statute from furthering that interest as the prohibition of advertising applied only in states that banned such advertisements and regulations permitted required disclosure of content on the labels of wines and spirits, and other alternatives were available that would have proven less intrusive to First Amendment protections.[2]

— under intermediate scrutiny, a Florida statute, making it a misdemeanor to impose a surcharge on a buyer for electing to use a credit card, but allowing the offering of a discount for the purpose of inducing payment by cash, violated businesses'

commercial speech rights as the statute did not restrict speech as part of addressing an illegal course of conduct, was not misleading, did not serve any substantial government interest, and was not narrowly tailored, and, although the statute purported to regulate commercial behavior, it had the sole effect of banning merchants from uttering the word "surcharge."[3]

— a rule prohibiting bail bondsmen from contacting potential customers within 24 hours after the offender's arrest violates the First Amendment protections for commercial speech absent a showing that the statute advanced the state's interest in preventing harassment.[4]

On the other hand, the courts have held that—

— a state statutory prohibition against a liquor license holder's use of a shared trade name, which complemented the state's prohibition against liquor franchises, does not infringe the commercial-speech rights of retail liquor store operators who formerly had franchise agreements and had used the same name, since the operators' use of the common name was not protected commercial speech, since it was misleading, as illustrated by the operators' attempt, in the wake of the statute's enactment, to circumvent the prohibitions by slightly altering the old common name and professing to be independent.[5]

— the restrictions placed on commercial speech by New York's apartment information vendor law (AIV), which regulated the business practices of the apartment referral industry, do not violate the First Amendment, given that the state had a substantial interest in deterring deceptive practices by persons who charged fees for information about apartment availability and location, and the law simultaneously protected customers from paying nonrefundable fees for information that could prove inaccurate or worthless, yet helped ensure that the AIVs would be paid, and was reasonably tailored to meet its objective.[6]

— the Securities Act requirement, that persons receiving consideration for touting stock announce the receipt of consideration and the amount thereof, satisfies the First Amendment requirements for regulation of commercial speech by being reasonably related to the government's interest in preventing the deception of investors.[7]

— enjoining the operator of a legal form preparation service from engaging in unauthorized practice of law in the preparation of bankruptcy petitions does not violate the operator's First Amendment commercial speech rights.[8]

— the exception for bail bondsmen with prior existing relationships to customers to the rule that restricted bail bondsmen from contacting potential customers between 9:00 p.m. and 9:00 a.m. Monday through Saturday and before noon or after 9:00 p.m. on Sunday was consistent with the county bail bond board's goal of decreasing harassment, and the rule does not violate the First Amendment protections regarding commercial speech.[9]

Observation:

A photographer has no First Amendment right to access to graduation ceremonies at state universities for the commercial purpose of taking photographs of the graduates and later soliciting the sale of such photographs, although the universities conducted a bidding process to allow certain commercial photographers such access.[10]

Footnotes

1 §§ 499 to 502.

2 Rubin v. Coors Brewing Co., 514 U.S. 476, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995).

3 Dana's R.R. Supply v. Attorney General, Florida, 807 F.3d 1235 (11th Cir. 2015).

4 Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447 (Tex. 2008).

5 Wine And Spirits Retailers, Inc. v. Rhode Island, 481 F.3d 1 (1st Cir. 2007).

6 Wang v. Pataki, 396 F. Supp. 2d 446 (S.D. N.Y. 2005).

7 U.S. v. Wenger, 292 F. Supp. 2d 1296 (D. Utah 2003), aff'd, 427 F.3d 840, 68 Fed. R. Evid. Serv. 805 (10th Cir. 2005).

8 The Florida Bar v. Catarcio, 709 So. 2d 96 (Fla. 1998).

9 Pruett v. Harris County Bail Bond Bd., 249 S.W.3d 447 (Tex. 2008).

10 Foto USA, Inc. v. Board of Regents of University System of Florida, 141 F.3d 1032, 125 Ed. Law Rep. 1091 (11th Cir. 1998).

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16A Am. Jur. 2d Constitutional Law § 504

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(4) Commercial Speech and Advertising

(b) Specific Types of Commercial Speech or Advertising

§ 504. Advertising on billboards and other outdoor advertising

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1675 to 1678

Commercial illustrations and advertisements on billboards are entitled to the same First Amendment protections afforded verbal commercial speech, and restrictions on the use of visual media of expression in advertising must survive intermediate scrutiny under the test of *Central Hudson*.[1]

While a city may distinguish between the relative value of different categories of commercial speech, it does not have the same range of choice in the area of noncommercial speech to evaluate the strength of or to distinguish between various communicative interests, and, as to noncommercial speech, a city may not choose appropriate subjects for public discourse.[2] A billboard ordinance, insofar as it contains exceptions permitting various kinds of noncommercial signs to remain but which bans commercial billboards and requires their removal, infringes upon the constitutional right of free speech.[3] Absent any explanation why noncommercial billboards located in places where commercial billboards are permitted would be more threatening to safe driving or would detract more from the beauty of the city, the city cannot by ordinance choose to limit the content of billboards to commercial messages.[4]

A city ordinance prohibiting billboards altogether, defined as off-site advertising signs, to promote the twin goals of aesthetics and traffic safety does not impermissibly restrict commercial speech.[5] On the other hand, a billboard ordinance violates the First Amendment where it requires a person to obtain a permit before erecting an off-site structure or sign and where, although the issuance of a permit by city officials was subject to some objective criteria relating to locational and structural standards, the city officials have discretion to deny a permit on the basis of ambiguous and subjective reasons, such as that the sign would have a harmful effect upon the health or welfare of the general public or would be detrimental to the aesthetic quality of the community or the surrounding land uses.[6]

A city's negligent handling of a billboard company's application for a sign permit, resulting in the delay of the processing of the application of more than 300 days, does not constitute a violation of the company's free speech rights where there is no evidence of the city's intentionally refusing to act on the application or of its being deliberately indifferent to the consequences of having the sign ordinance lacking procedural safeguards.[7]

A provision of a state statute prohibiting all billboard advertising displays adjacent to landscaped freeways, except for on-premises advertising, extended to noncommercial speech, and the statute violates the First Amendment by impermissibly favoring commercial over noncommercial speech, where nothing in the statute created an exception for noncommercial advertisements and no controlling case law construed the statute to include any such exception.[8]

Municipal ordinances regulating billboards satisfy the First Amendment requirement that they directly advance the municipalities' stated interest in safety and aesthetics where the ordinances reduce driver distractions and advance aesthetic considerations.[9] Municipal ordinances limiting the areas where billboards can be erected satisfy the First Amendment requirement that they reach no further than necessary to accomplish stated goals where the ordinances do not have to impose the least possible restriction on the speech, and given the nature of safety and aesthetic concerns underlying the ordinances, the total ban in some areas was the only solution to the problems.[10] A town ordinance, limiting billboards located in certain areas to advertisement of the services available on the premises where the sign is located, does not violate the First Amendment by allowing the officials issuing the advertising permits to make content-based determinations as they read and either approve or reject applications, since in approving the applications, the officials would be required only to read content-neutral statements regarding the size and proposed location of the billboard, and whether the advertised service is provided on-site.[11]

A city ordinance prohibiting new off-site outdoor advertising billboards except pursuant to "relocation" agreements upon removal of existing authorized billboards did not amount to an unconstitutional prior restraint in violation of the federal and state constitutional free speech rights of a billboard company that sought to build a new off-site billboard without removing any existing billboard, since the ordinance was content-neutral, where the ordinance burdened no more speech than necessary to accomplish the city's interest in increased traffic safety and aesthetics, and the ordinance did not afford the city unbridled discretion.[12]

A municipal ordinance prohibiting airborne signs or advertising devices, may be deemed reasonable, for the purpose of First Amendment free speech analysis of aerial advertisement banner-towing above beaches, where the ordinance fulfills several legitimate needs, including preserving the economically vital scenic beauty of the municipality and minimizing traffic safety hazards for motorists and pedestrians.[13]

CUMULATIVE SUPPLEMENT

Cases:

City outdoor advertising ordinance imposing excise tax on billboard owner's privilege to charge others a fee to use billboard space did not impermissibly burden owner's right to freedom of speech under the First Amendment and Maryland Constitution; billboard owner's economic activity was not expressive or communicative, and ordinance was content neutral, applicable whenever an outdoor advertiser such as billboard owner charged third parties to use its space, regardless of the content displayed on the billboards or who paid billboard owner to display it. U.S. Const. Amend. 1; Md. Const. art. 40. Clear Channel Outdoor, Inc. v. Director, Department of Finance of Baltimore City, 244 Md. App. 304, 223 A.3d 1050 (2020), cert. granted, 468 Md. 543, 228 A.3d 163 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985); Citizens for Free Speech, LLC v. County of Alameda, 114 F. Supp. 3d 952 (N.D. Cal. 2015).
As to the test of *Central Hudson*, see § 500.

2 Desert Outdoor Advertising, Inc. v. City of Moreno Valley, 103 F.3d 814 (9th Cir. 1996) (an ordinance is invalid if it imposes greater restrictions on noncommercial than on commercial billboards or regulates noncommercial billboards based on their content).

3 Ackerley Communications of Massachusetts, Inc. v. City of Cambridge, 88 F.3d 33 (1st Cir. 1996).

4 Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981); Ackerley Communications of Northwest Inc. v. Krochalis, 108 F.3d 1095 (9th Cir. 1997).

5 Outdoor Graphics, Inc. v. City of Burlington, Iowa, 103 F.3d 690 (8th Cir. 1996); Ackerley Communications of Northwest Inc. v. Krochalis, 108 F.3d 1095 (9th Cir. 1997); Southlake Property Associates, Ltd. v. City of Morrow, Ga., 112 F.3d 1114 (11th Cir. 1997).
As to the First Amendment protection of commercial speech, see §§ 499 to 503.

6 Desert Outdoor Advertising, Inc. v. City of Moreno Valley, 103 F.3d 814 (9th Cir. 1996).

7 Covenant Media Of SC, LLC v. City Of North Charleston, 493 F.3d 421 (4th Cir. 2007).

8 Maldonado v. Kempton, 422 F. Supp. 2d 1169 (N.D. Cal. 2006).

9 Nichols Media Group, LLC. v. Town of Babylon, 365 F. Supp. 2d 295 (E.D. N.Y. 2005).

10 Nichols Media Group, LLC. v. Town of Babylon, 365 F. Supp. 2d 295 (E.D. N.Y. 2005).

11 Nichols Media Group, LLC. v. Town of Babylon, 365 F. Supp. 2d 295 (E.D. N.Y. 2005).

12 City of Corona v. AMG Outdoor Advertising, Inc., 244 Cal. App. 4th 291, 197 Cal. Rptr. 3d 563 (4th Dist. 2016), as modified on other grounds, (Jan. 26, 2016).

13 Center for Bio-Ethical Reform, Inc. v. City and County of Honolulu, 455 F.3d 910 (9th Cir. 2006).

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C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(4) Commercial Speech and Advertising

(b) Specific Types of Commercial Speech or Advertising

§ 505. Advertising sent by mail

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1640

Under the First Amendment, "the level of commercial discourse reaching the mailbox cannot be limited to that which would be suitable for children playing in a sandbox." A statute prohibiting the unsolicited mailing of contraceptive advertisements cannot be justified under the First Amendment on the ground that it aided parents' efforts to discuss birth control with their children, where the marginal degree of protection achieved by purging all mailboxes of unsolicited material that was entirely suitable for adults was more extensive than the Constitution permitted.[1]

Footnotes

1 Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983).

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(4) Commercial Speech and Advertising

(b) Specific Types of Commercial Speech or Advertising

§ 506. Advertising in books, magazines, and newspapers

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1640

The free publication and dissemination of books and other forms of the printed word are protected by the constitutional guarantee of freedom of speech and of the press, irrespective of whether the dissemination takes place under commercial or noncommercial auspices.[1] The First Amendment protects speech even though it is in the form of a paid advertisement in a book, magazine, or newspaper; in a form that is sold for profit; or in the form of a solicitation to pay or contribute money. Such speech is not withdrawn from protection merely because it proposes a mundane commercial transaction or because the speaker's interest is largely economic.[2] The degree of First Amendment protection is not diminished merely because the newspaper or speech is sold rather than given away.[3]

Observation:

Statements in a paid political advertisement opposing the incumbent mayor published in a newspaper on Saturday and Monday immediately preceding the Tuesday election, which included assertions that the "city is broke because of his management," and that

the mayor "squandered $1.5 million of surplus money" are not so definite or precise as to be branded false but rather are political opinion solidly protected by the First Amendment.[4]

Footnotes

1 Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974); Atlanta Co-op News Project v. U.S. Postal Service, 350 F. Supp. 234 (N.D. Ga. 1972).

2 U.S. v. Kokinda, 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990).

3 City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

4 Welch v. American Publishing Co. of Kentucky, 3 S.W.3d 724 (Ky. 1999).

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1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(4) Commercial Speech and Advertising

(b) Specific Types of Commercial Speech or Advertising

§ 507. Advertising of gambling and lottery activities

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1651

A federal statute prohibiting the radio broadcast of lottery advertising by licensees located in nonlottery states directly advances the governmental interest of balancing the interests of lottery and nonlottery states for the purpose of determining whether the statute violates the First Amendment, even when a radio station located in a nonlottery state has signals reaching into a lottery state. Congress clearly is entitled to determine that the broadcast of promotional advertising of lotteries would undermine a nonlottery state's policy against gambling, even if the audience in the nonlottery state is not wholly unaware of the lottery's existence.[1] However, a federal statute prohibiting the broadcasting of advertising or information concerning any "lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance" violates the First Amendment on the grounds that it does not, under the *Central Hudson* analysis, directly advance the government's purported interests in reducing public participation in commercial lotteries and in protecting states which choose not to permit casino gambling within their borders, where the statutory ban is subject to numerous exceptions for state-run lotteries, fishing contests, not-for-profit lotteries, lotteries conducted as promotional activities by commercial organizations, and lawful gaming conducted by Indian tribes.[2]

A prohibition on broadcasting lottery information cannot be applied consistent with the First Amendment to advertisements of lawful private casino gambling that were broadcast by the petitioners' radio or television stations located in a state where such

gambling is legal, and the government, which permitted tribal casinos, presented no convincing reason for pegging its speech ban to the identity of the owners or operators of the advertised casinos.[3] Restrictions on limited video lottery advertising by retailers imposed by a state statute do not violate the First Amendment commercial speech protections, where the advertising restrictions serve the state's interests in conducting its video lottery in a manner that raises revenue but avoids amplifying the social ills associated with gambling, and in reducing the demand for the video lottery in private establishments, while the unlimited right to advertise video lotteries posed the risk of spreading the negative effects of lotteries throughout the state.[4]

Footnotes

1 U.S. v. Edge Broadcasting Co., 509 U.S. 418, 113 S. Ct. 2696, 125 L. Ed. 2d 345 (1993).

2 Valley Broadcasting Co. v. U.S., 107 F.3d 1328 (9th Cir. 1997).

3 Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 119 S. Ct. 1923, 144 L. Ed. 2d 161, 164 A.L.R. Fed. 711 (1999).

4 WV Ass'n of Club Owners and Fraternal Services, Inc. v. Musgrave, 553 F.3d 292 (4th Cir. 2009).

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(4) Commercial Speech and Advertising

(b) Specific Types of Commercial Speech or Advertising

§ 508. Advertising of professional services

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1646

A.L.R. Library

Validity of statute or ordinance forbidding pharmacists to advertise prices of drugs or medicines, 44 A.L.R.3d 1301

The First Amendment protects commercial speech, such as advertising one's profession, that is truthful and not misleading.[1] Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent deception.[2]

A ban on advertising by attorneys violates First Amendment rights.[3] Lawyer advertising is deemed commercial speech and as such it is accorded a measure of First Amendment protection,[4] but the protection it is afforded is not absolute.[5] A state may not, consistent with the First and 14th Amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain

by sending truthful and nondeceptive letters to potential clients known to face particular legal problems, since such advertising is constitutionally protected commercial speech which the state can regulate through less restrictive and more precise means, such as requiring lawyers to file any solicitation letters with a state agency.[6]

Observation:

Although an attorney's listing that he or she is a member of the bar of the Supreme Court of the United States is at least in bad taste and such a statement can be misleading to the general public unfamiliar with the requirements of admission to the bar of the Supreme Court, an absolute prohibition of listing that information violates the First Amendment without some finding that the statement can be misleading.[7] Also, a requirement, pursuant to a state bar rule prohibiting self-laudatory advertisements, that an advertisement containing a statement that the attorney received a national legal directory's "highest rating" has to include a disclaimer stating that the directory's ratings were based "exclusively on opinions expressed by confidential sources" is an unconstitutional restriction on commercial speech, since the mere fact that the general public might have been unfamiliar with the legal directory's rating system is not sufficient to justify the disclaimer, the state's claim that the rating is "potentially misleading" does not relieve it of its burden of demonstrating that the harm of misleading the public is real and that the restriction would alleviate that harm to a material degree, and where the state failed to present empirical evidence of any sort suggesting that the use of the rating would mislead the unsophisticated public in the absence of a disclaimer.[8]

A ban on advertising by accountants also violates First Amendment rights.[9] A certified public accountant's personal solicitation of potential clients, seeking to communicate no more than truthful, nondeceptive information proposing lawful commercial transactions, is a "commercial expression" to which the protections of the First Amendment apply; therefore, a state's blanket ban on direct, in-person, uninvited solicitation by certified public accountants (CPAs) is not a reasonable restriction on the manner in which CPAs can communicate with prospective clients.[10]

Similarly, a ban on advertising by physicians violates the First Amendment.[11]

Commercial advertising of prescription drug prices by pharmacists is entitled to the protection of the First Amendment, notwithstanding its "commercial speech" character.[12]

Footnotes

1 Locke v. Shore, 682 F. Supp. 2d 1283 (N.D. Fla. 2010), aff'd, 634 F.3d 1185 (11th Cir. 2011).

2 In re R. M. J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); Jarlstrom v. Aldridge, 366 F. Supp. 3d 1205 (D. Or. 2018).

3 Peel v. Attorney Registration and Disciplinary Com'n of Illinois, 496 U.S. 91, 110 S. Ct. 2281, 110 L. Ed. 2d 83 (1990); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985).

4 Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995); Kirkpatrick v. Shaw, 70 F.3d 100 (11th Cir. 1995).

5 Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (holding that state bar rules which prohibited lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster advanced the bar's interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers in a direct and material way).

Professional conduct rules that permitted an attorney to make blog posts on specific or cumulative case results, but required disclaimer to explain to the public that no results were guaranteed, were not more extensive than was necessary to serve the State Bar's substantial government interest in protecting the public from potentially misleading lawyer advertising, satisfying a First Amendment requirement for regulation of commercial speech; the rules required that the disclaimer be in bold type face and uppercase letters in a font size at least as large as, and in the same color and against the same background, the text used to advertise specific or cumulative case results. Hunter v. Virginia State Bar ex rel. Third Dist. Committee, 285 Va. 485, 744 S.E.2d 611 (2013).

6 Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S. Ct. 1916, 100 L. Ed. 2d 475 (1988).

7 In re R. M. J., 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982).

8 Mason v. Florida Bar, 208 F.3d 952 (11th Cir. 2000).

9 Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy, 512 U.S. 136, 114 S. Ct. 2084, 129 L. Ed. 2d 118 (1994).

10 Edenfield v. Fane, 507 U.S. 761, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993).

11 Health Systems Agency of Northern Virginia v. Virginia State Bd. of Medicine, 424 F. Supp. 267 (E.D. Va. 1976).

12 Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976).

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C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(4) Commercial Speech and Advertising

(b) Specific Types of Commercial Speech or Advertising

§ 509. Advertising of alcohol and tobacco products

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1645, 1649, 1650

A city may reasonably conclude that regulation of the outdoor advertising of alcoholic beverages directly and materially advances the city's interest in promoting the welfare and temperance of minors. A city ordinance prohibiting the placement of stationary outdoor advertising that advertises alcoholic beverages in certain areas where children are likely to walk to school or play, in an effort to promote the welfare and temperance of minors, does not violate the commercial speech protections of the First Amendment.[1] However, a state's complete statutory ban on price advertising for alcoholic beverages abridges speech in violation of the First Amendment.[2] Also, a federal statute prohibiting the display of alcohol content on beer labels violates the First Amendment's protection of commercial speech, even though the government has a substantial interest in protecting the health, safety, and welfare of citizens by preventing brewers from competing on the basis of alcohol strength, and even though the government has an interest in facilitating state efforts to regulate alcohol under the 21st Amendment.[3]

Cigarette advertising is "commercial speech," and subject to the principles governing First Amendment protection of commercial speech.[4] A commercial-speech regulation which prohibits statements that tobacco products reduced harm or risk of tobacco-related disease without regulatory approval, directly advances a substantial government interest in preventing fraudulent claims about the relative health benefits of tobacco products, and is no more extensive than necessary where it prevented inherently

misleading claims by conditioning regulatory approval on a demonstration that products reduced harm to both individuals and the population as whole, and potentially less-restrictive alternatives had already been tried and found wanting.[5] A city's objective in reducing cigarette consumption by minors is a "substantial public interest," for the purposes of determining whether a city ordinance limiting the location of signs that advertise cigarettes amounts to an impermissible regulation of commercial speech.[6] State regulations prohibiting outdoor advertising of smokeless tobacco or cigars within 1,000 feet of a school or playground violate the First Amendment where although the regulations directly advance the governmental interest in preventing underage use of smokeless tobacco and cigars, their reach, constituting nearly a complete ban in some metropolitan areas, unduly impinge the sellers' opportunity to propose legal transactions with adults.[7] Similarly, state regulations prohibiting indoor, point-of-sale advertising of smokeless tobacco and cigars lower than five feet from the floor of a retail establishment located within 1,000 feet of a school or playground violate the First Amendment where the rules do not advance the governmental interest in preventing the underage use of smokeless tobacco and cigars.[8] On the other hand, state regulations requiring retailers to place tobacco products behind the counters and requiring customers to have contact with a salesperson before they are able to handle such products do not violate the First Amendment where the state has a substantial interest in preventing access to tobacco products by minors and the regulations are an appropriately narrow means of advancing that interest.[9]

Footnotes

1 Anheuser-Busch, Inc. v. Schmoke, 101 F.3d 325 (4th Cir. 1996).

2 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996).

3 Rubin v. Coors Brewing Co., 514 U.S. 476, 115 S. Ct. 1585, 131 L. Ed. 2d 532 (1995).

4 In re Tobacco Cases II, 41 Cal. 4th 1257, 63 Cal. Rptr. 3d 418, 163 P.3d 106 (2007).
As to the regulation of commercial speech, generally, see §§ 499 to 503.

5 Discount Tobacco City & Lottery, Inc. v. U.S., 674 F.3d 509 (6th Cir. 2012).

6 Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore, 101 F.3d 332 (4th Cir. 1996).

7 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001).

8 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001).

9 Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 121 S. Ct. 2404, 150 L. Ed. 2d 532 (2001).

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(4) Commercial Speech and Advertising

(b) Specific Types of Commercial Speech or Advertising

§ 510. Advertising of sexual devices

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1640

A state statute prohibiting the advertising and distribution of sexual devices violates the First Amendment where the ban is more extensive than necessary to advance the state interest in safeguarding public morality.[1]

Footnotes

1 This That and Other Gift and Tobacco, Inc. v. Cobb County, Ga., 285 F.3d 1319 (11th Cir. 2002).

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§ 511. Advertising involving abortion services and contraceptives

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1648

A state is not free of constitutional restraints under the First Amendment, in regard to the prosecution of a newspaper editor for violating a statute making it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the procuring of an abortion, where the editor published an advertisement of an out-of-state organization which offered services relating to obtaining legal abortions in the state where the organization was located, merely because the advertisement involved sales or solicitations, because the editor was paid for printing it, or because the editor's motive or the motive of the advertiser may have involved financial gain.[1] Likewise, a state statute which prohibits any advertisement or display of contraceptives is an unconstitutional suppression of expression protected by the First Amendment, and such total suppression of commercial speech cannot be justified on the ground that the advertisements of contraceptive products would be offensive and embarrassing to those exposed to them and would legitimize the sexual activity of young people.[2]

Footnotes

1 Bigelow v. Virginia, 421 U.S. 809, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975).

2 Carey v. Population Services, Intern., 431 U.S. 678, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977).

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c. Freedom of Speech and Press

(4) Commercial Speech and Advertising

(b) Specific Types of Commercial Speech or Advertising

§ 512. Political advertising

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1640

A provision of a campaign advertising and financing statute requiring advertisements made by individuals to contain the name and address of the individual paying for it violates the First Amendment right to independent personal expression and would be stricken.[1] On the other hand, organizations and individuals, including political candidates, advocates, and filmmakers, have a First Amendment right to use in political advertisements video footage from state assembly hearings that the were made publicly available through the state's television signal.[2]

Footnotes

1 Doe v. Mortham, 708 So. 2d 929 (Fla. 1998).
As to freedom of speech principles applicable to politicians and candidates for office, generally, see §§ 189, 489.

2 Firearms Policy Coalition Second Amendment Defense Committee v. Harris, 192 F. Supp. 3d 1120 (E.D. Cal. 2016).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(5) Limitations on Right of Free Speech and Press

§ 513. Limitations on right of free speech and press, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1498

The right or privilege of free speech and press, guaranteed by the Constitutions of the United States and of the several states, has its limitations;[1] the right is not absolute[2] at all times and under all circumstances,[3] although limitations are recognized only in exceptional cases.[4] The constitutional test established in free speech cases is that where there is a significant encroachment upon personal liberty, the state may prevail only upon showing a compelling subordinating interest.[5]

Observation:

An injury to official reputation is an insufficient reason for repressing speech that would otherwise be free and protected by the First Amendment.[6]

Freedom of speech does not comprehend the right to speak whenever, however, and wherever one pleases, and the manner, place, or time of public discussion can be constitutionally controlled.[7]

An oath of secrecy taken by grand jurors or witnesses before a grand jury does not deprive them of their constitutional right of free speech, which right is not absolute.[8] However, a state statute prohibiting a witness from ever disclosing his or her testimony given before a grand jury violates the First Amendment insofar as it prohibits the witness from disclosing his or her own testimony after the grand jury's term has ended; the state's interest in preserving grand jury secrecy is either not served by or insufficient to warrant a proscription of truthful speech on matters of public concern.[9]

The First Amendment does not confer an absolute right to speak or publish, without responsibility, whatever one may choose.[10] A newspaper publisher and reporter may be held liable for invasion of privacy on the basis of evidence that the reporter, acting within the scope of his employment at the newspaper, had portrayed the plaintiffs in a false light through a known or reckless untruth.[11]

The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn.[12] The Constitution of the United States places on the Supreme Court the duty to say where the individual's freedom ends and the state's power begins.[13] Whenever the constitutional freedom of speech and of association are asserted against the exercise of valid governmental powers, a reconciliation must be effected, requiring an appropriate weighing and balancing of the respective interests involved.[14]

CUMULATIVE SUPPLEMENT

Cases:

While the States traditionally have had broad powers to limit grand jury speech, grand juries are expected to operate within the limits of the First Amendment, as well as the other provisions of the Constitution. U.S. Const. Amend. 1. Doe v. Bell, 969 F.3d 883 (8th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Roth v. U.S., 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957); Poulos v. State of N.H., 345 U.S. 395, 73 S. Ct. 760, 97 L. Ed. 1105, 30 A.L.R.2d 987 (1953).

2 Petition of Variable for Change of Name v. Nash, 144 N.M. 633, 2008-NMCA-105, 190 P.3d 354 (Ct. App. 2008).

3 Petition of Variable for Change of Name v. Nash, 144 N.M. 633, 2008-NMCA-105, 190 P.3d 354 (Ct. App. 2008).

4 Brown v. Kingsley Books, Inc., 1 N.Y.2d 177, 151 N.Y.S.2d 639, 134 N.E.2d 461 (1956), judgment aff'd, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957).

5 1621, Inc. v. Wilson, 402 Pa. 94, 166 A.2d 271, 93 A.L.R.2d 1274 (1960).

6 In re McClatchy Newspapers, Inc., 288 F.3d 369 (9th Cir. 2002).

7 § 534.

8 Goodman v. U.S., 108 F.2d 516, 127 A.L.R. 265 (C.C.A. 9th Cir. 1939).

9 Butterworth v. Smith, 494 U.S. 624, 110 S. Ct. 1376, 108 L. Ed. 2d 572 (1990).

10 Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).

11 Cantrell v. Forest City Pub. Co., 419 U.S. 245, 95 S. Ct. 465, 42 L. Ed. 2d 419 (1974).

12 Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972); Blount v. Rizzi, 400 U.S. 410, 91 S. Ct. 423, 27 L. Ed. 2d 498 (1971).

13 Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

14 Konigsberg v. State Bar of Cal., 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(5) Limitations on Right of Free Speech and Press

§ 514. Limitation on right of free speech and press by legislation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490

It is well settled that the rights of free speech and press are subject to legislative restriction within proper limits.[1] It has never been deemed an abridgment of freedom of speech or of the press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.[2] Also, the prohibition of legislation against free speech is not intended to give immunity for every use or abuse of language;[3] the right of free speech and press does not prevent the punishment of those who abuse such freedom.[4] The essential rights of the First Amendment in some instances are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery.[5] These freedoms are subject to limitation by a proper exercise of the police power of the states.[6] For example, while states no doubt possess legitimate power to protect children from harm, that power does not include a free-floating power to restrict ideas to which children may be exposed.[7] Congress may distinguish between advocating change in the existing order by lawful elective processes and advocating change by force and violence; freedom for the one does not include freedom for the other, and a denial of the freedom to teach violence is not a denial of free speech.[8] However, any legislation affecting freedom of expression is closely scrutinized to see that the interferences allowed are only those appropriate to the maintenance of a civilized society,[9] for in the First Amendment area government may regulate only with narrow specificity to prevent a supposed evil.[10]

Observation:

Where a law establishes a financial disincentive to create or publish works with a particular content, as where a criminal seeks to profit from his or her crimes, the state, in order to justify such differential treatment, must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.[11]

Perfect clarity and precise guidance are not required even of regulations that restrict expressive activity protected by the First Amendment.[12] However, stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech.[13] Where First Amendment freedoms are at stake, a precision of drafting and clarity of purpose of regulating legislation are essential.[14] Where a prohibition is directed at speech and the speech is intimately related to the process of governing, the state may prevail only upon showing a subordinating interest which is compelling, and the burden is on the government to show the existence of such an interest.[15] The constitutional guarantee of freedom of speech forbids the states to punish the use of words or language not within narrowly limited classes of speech,[16] and even as to such a class, the power to regulate must be so exercised, in attaining a permissible end, as not to unduly infringe the protected freedom,[17] since free expression cannot be abridged or denied in the guise of regulation.[18] Governmental interference with constitutionally protected pure speech can be justified only as a regulation of the manner in which the freedom of speech is exercised and not as a prohibition of the substantive message conveyed.[19]

With respect to freedom of speech and of the press, the First Amendment functions as a check on legislative power.[20] The states do not have greater latitude than the United States Congress to abridge the freedom of speech.[21]

Footnotes

1 Konigsberg v. State Bar of Cal., 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961).

2 Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996).

3 Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957).

4 People v. Talley, 172 Cal. App. 2d Supp. 797, 332 P.2d 447 (App. Dep't Super. Ct. 1958), judgment rev'd on other grounds, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960).

5 Joseph v. U.S. Civil Service Commission, 554 F.2d 1140 (D.C. Cir. 1977).

6 § 397.

7 § 486.

8 Harisiades v. Shaughnessy, 342 U.S. 580, 72 S. Ct. 512, 96 L. Ed. 586 (1952).
As to the "clear and present danger" doctrine, see § 515.

9 U.S. v. Irving, 509 F.2d 1325 (5th Cir. 1975).

10 Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).
As to overbreadth of legislation affecting First Amendment rights, generally, see §§ 421 to 423.

11 Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) (construing New York's "Son of Sam" law).

12 Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018).

13 Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).

14 Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).

15 Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990) (overruled on other grounds by, Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)).

16 Hess v. Indiana, 414 U.S. 105, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973); Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

17 Gooding v. Wilson, 405 U.S. 518, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972).

18 Miller v. California, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).

19 Cohen v. California, 403 U.S. 15, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971).

20 Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978).

21 First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(5) Limitations on Right of Free Speech and Press

§ 515. "Clear and present danger" doctrine as limitation on free speech

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1529

The "clear and present danger" doctrine, first formulated in an early case,[1] provides protection for utterances so that the printed or spoken word may not be the subject of a previous restraint or subsequent punishment, unless its expression creates a clear and present danger of bringing about a substantial evil which either the federal or state government has the power to prohibit.[2] The doctrine, simply stated, is that speech alone may neither be forbidden nor penalized, unless it presents a clear and present danger of some serious substantive evil.[3]

Certainly, enjoining or preventing First Amendment activities before the demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation. The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs rather than to prevent it from occurring in order to obviate possible unlawful conduct.[4] The issue in every case is whether the words used are used in such circumstances and are of such a nature as to create a "clear and present danger" that they will bring about serious substantive evils which rise far above public inconvenience, annoyance, or unrest.[5]

Any attempt to restrict First Amendment liberties must be justified by a clear public interest, threatened not doubtfully or remotely, but by a clear and present danger; the rational connection between the remedy provided and the evil to be curbed,

which in another context might support legislation against the attack on due process grounds, will not suffice.[6] The government may cut off a person's right to speak his or her views only when these views are no longer merely views but threaten, clearly and imminently, to ripen into conduct against which the public has a right to protect itself.[7] The likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon the freedom of speech or of the press; the evil itself must be substantial and serious.[8]

Properly applied, the clear and present danger test requires a court to make its own inquiry into the imminence and the magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression; a court should also weigh the possibility that other measures will serve a state's interests.[9]

Footnotes

1 Schenck v. U.S., 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

2 Associated Press v. U.S., 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945).

3 Matter of Welfare of A. J. B., 929 N.W.2d 840 (Minn. 2019); People v. Rodriguez, 19 Misc. 3d 830, 860 N.Y.S.2d 859 (N.Y. City Crim. Ct. 2008).

4 Collins v. Jordan, 110 F.3d 1363 (9th Cir. 1996).

5 Terminiello v. City of Chicago, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949); Aubin v. Columbia Casualty Company, 272 F. Supp. 3d 828 (M.D. La. 2017); Brummer v. Wey, 166 A.D.3d 475, 89 N.Y.S.3d 11 (1st Dep't 2018).

6 Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945).

7 American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

8 Wood v. Georgia, 370 U.S. 375, 82 S. Ct. 1364, 8 L. Ed. 2d 569 (1962).

9 Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978).

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C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(5) Limitations on Right of Free Speech and Press

§ 516. "Clear and present danger" doctrine as limitation on free speech—Application of doctrine

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1529

The term "clear and present danger" may not be applied as a mechanical test in every case touching First Amendment freedoms, without regard to the context of its application. Where particular conduct is regulated in the interest of public order and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of the two conflicting interests demands the greater protection under the particular circumstances presented.[1]

The question as to the kind of danger which must be "clear and present" to justify interference with the right of free speech and press cannot be answered in the abstract; the danger may be described by the court in general terms, such as a clear and present danger to a substantial interest of the state,[2] or to "interests which the state may lawfully protect,"[3] or to danger short of a threat as comprehensive and vague as a threat to the safety of the republic or "the American way of life."[4]

More often than not, the kind of danger contemplated by the clear and present danger rule depends upon the specific facts of a particular case.[5] The rule has been applied—with very mixed results—in cases involving—

— criminal prosecutions for opposition to war.[6]

— statutes penalizing the advocacy of the overthrow of the government by force or violence.[7]

— attacks on courts or judges or contempt proceedings against lawyers.[8]

— picketing.[9]

— regulation of prison inmates' access to newspapers, periodicals, and so forth.[10]

— incitement to commit crimes.[11]

— breach of the peace or disorderly conduct.[12]

— miscellaneous situations.[13]

The "clear and present danger" rule has been held not applicable to cases involving—

— antitrust laws.[14]

— libel cases.[15]

— statutes regulating the conduct of labor union affairs.[16]

— statutes governing the use of school property for nonschool purposes.[17]

— demonstrations in an inappropriate place, such as before a courthouse.[18]

Footnotes

1 DeGregory v. Attorney General of State of N.H., 383 U.S. 825, 86 S. Ct. 1148, 16 L. Ed. 2d 292 (1966).

2 Elfbrandt v. Russell, 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966).

3 Frazier ex rel. Frazier v. Winn, 535 F.3d 1279, 235 Ed. Law Rep. 737 (11th Cir. 2008).

4 Pennekamp v. State of Fla., 328 U.S. 331, 66 S. Ct. 1029, 90 L. Ed. 1295 (1946).

5 Brown v. State of La., 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966).

6 Schaefer v. U S, 251 U.S. 466, 40 S. Ct. 259, 64 L. Ed. 360 (1920).

7 Scales v. U.S., 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782 (1961) (advocacy of the overthrow of the government by force and violence is not constitutionally protected speech).

8 Carroll v. Jaques Admiralty Law Firm, P.C., 110 F.3d 290 (5th Cir. 1997) (a district court's imposition of a sanction on an attorney for abusive conduct, including the use of threats and profanity, at his deposition did not violate the attorney's First Amendment rights).

9 Thornhill v. State of Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940) (there was no clear and present danger of destruction of life or property, or of invasion of the right of privacy, or of breach of the peace, from picketing activities).

10 Am. Jur. 2d, Penal and Correctional Institutions § 57.

11 Musser v. Utah, 333 U.S. 95, 68 S. Ct. 397, 92 L. Ed. 562 (1948).

12 Edwards v. South Carolina, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963).

13 Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978) (for the purposes of determining the constitutionality under the First Amendment of a state statute under which a newspaper is subject to criminal sanctions for divulging truthful information about confidential proceedings concerning a state commission's hearing of complaints regarding a judge's disability or misconduct, a state

court, in applying the clear and present danger test, errs in holding that actual proof of a clear and present danger to the orderly administration of justice is unnecessary on the grounds that the state legislature has already made a finding to that effect); City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167, 97 S. Ct. 421, 50 L. Ed. 2d 376 (1976) (a nonunion teacher's speech at a school board meeting, concerning a provision in a collective bargaining agreement then under negotiation between the union representing the teachers in the school district, did not constitute "negotiation" with the school board and so could not be restricted under state law as presenting a clear and present danger to labor-management relations).

14 Associated Press v. U.S., 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945).

15 Beauharnais v. People of State of Ill., 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1952).

16 American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

17 Am. Jur. 2d, Schools §§ 99, 446, 447.

18 Cox v. State of La., 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(5) Limitations on Right of Free Speech and Press

§ 517. "Clear and present danger" doctrine as limitation on free speech—Rule as to advocacy of unlawful acts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1500, 1529

The First Amendment protects not only abstract discussion but also vigorous advocacy against governmental intrusion.[1]

Observation:

Although agreements to engage in illegal conduct undoubtedly possess some element of association, the state may ban such agreements without trenching on any right of association protected by the First Amendment. The fact that such an agreement necessarily takes the form of words does not confer upon it or on any underlying conduct constitutional immunities that the First Amendment extends to speech.[2]

As regards state action, the advocacy rule has been stated to the effect that the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation, except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[3] Advocacy of conduct proscribed by law is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy will be immediately acted on.[4] Speech that merely stirs passions, resentment, or anger is fully protected by the First Amendment.[5] On the other hand, it is well settled that the principle of freedom of speech does not sanction incitement to commit crimes.[6]

In some specific situations, the advocacy of committing unlawful acts or of the forceful overthrow of the government has been held not protected by the free speech and press guarantee, without the court considering whether the advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. It has been so held where the issue was an applicant's admission to the bar,[7] or the advocacy of unlawful acts by an officer in the Armed Forces of the United States,[8] or the deportation of an alien.[9]

The "advocacy rule" has been applied in cases involving criminal prosecutions for opposition to a war or to the military generally,[10] to cases involving advocacy of the overthrow of the government by force and violence,[11] and to cases presenting other situations.[12]

Observation:

A statute prohibiting the provision of material support or resources to a designated foreign terrorist organization (FTO) does not impermissibly restrict the defendants' First Amendment right to free speech with respect to the defendants' sending of monetary donations to the FTO; the defendants are entitled under the First Amendment to publish articles arguing that the FTO was not really a terrorist organization, but they are not entitled to furnish bombs to the FTO or money to buy bombs and ammunition.[13]

Footnotes

1 New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964).

2 Brown v. Hartlage, 456 U.S. 45, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982).

3 Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 94 S. Ct. 656, 38 L. Ed. 2d 635 (1974); Collins v. Jordan, 110 F.3d 1363 (9th Cir. 1996).

4 Healy v. James, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972); McCoy v. Stewart, 282 F.3d 626 (9th Cir. 2002).

5 Collins v. Jordan, 110 F.3d 1363 (9th Cir. 1996).

6 § 523.

7 In re Anastaplo, 366 U.S. 82, 81 S. Ct. 978, 6 L. Ed. 2d 135 (1961); Konigsberg v. State Bar of Cal., 366 U.S. 36, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961).

8 Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974).

9 Harisiades v. Shaughnessy, 342 U.S. 580, 72 S. Ct. 512, 96 L. Ed. 586 (1952).

10 Parker v. Levy, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974); Hess v. Indiana, 414 U.S. 105, 94 S. Ct. 326, 38 L. Ed. 2d 303 (1973).

11 Communist Party of Indiana v. Whitcomb, 414 U.S. 441, 94 S. Ct. 656, 38 L. Ed. 2d 635 (1974).

12 Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982) (a village ordinance licensing and regulating the sale of items displayed "with" or "within the proximity of" "literature encouraging the illegal use of cannabis or illegal drugs" does not violate the First Amendment rights of a retailer who sold smoking accessories, since the ordinance did not restrict speech as such but simply regulated the commercial marketing of items that might be used for an illicit purpose); Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (reversing the conviction of a leader of a Ku Klux Klan group for advocating the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform, and for voluntarily assembling with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism).

13 U.S. v. Afshari, 426 F.3d 1150 (9th Cir. 2005).

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Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(6) Unprotected Utterances

§ 518. Unprotected utterances, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1545, 1559 to 1561, 1620

Trial Strategy

Proof of Facts Establishing a Party's Entitlement to Punitive Damages in a Defamation Cause of Action, 104 Am. Jur. Proof of Facts 3d 221

Proof of Facts Establishing Affirmative Defenses Against a Claim for Defamation, 99 Am. Jur. Proof of Facts 3d 393

The protective cloak of the constitutional freedoms of speech and of the press is limited in its scope,[1] and the unconditional phrasing of the First Amendment is not intended to protect every utterance.[2] The First Amendment has no application when what is restricted is not protected speech.[3] Even the "most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic,"[4] nor would it preclude the expulsion of hecklers from assemblies or permit religious worship to be disturbed by those anxious to preach a doctrine of atheism.[5]

Speech is generally protected by the First Amendment, with restrictions in a few limited areas, such as obscenity, defamation, fraud, incitement, fighting words, pornography produced with real children,[6] and speech integral to criminal conduct.[7] Indeed, the right of free speech is not absolute at all times and under all circumstances, and there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem, and these include the lewd and obscene, the profane, the libelous, and the insulting or fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[8] The First Amendment permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[9] Unwanted speech that threatens, alarms, harasses, or annoys an individual may be proscribed without violating the speaker's right to free expression.[10]

The constitutional guarantees do not permit unrestricted utterances or publication of remarks or literature which are threatening,[11] untruthful, or fraudulent.[12] Lies and untruthful statements are protected under First Amendment jurisprudence only in those rare instances where they contribute to the uninhibited marketplace of ideas.[13] Where false claims are made to effect a fraud or secure moneys or other valuable considerations, such as offers of employment, the government may restrict speech without affronting the First Amendment.[14]

However, the First Amendment does not permit the government to ban speech because it is offensive to unwilling listeners, unless the speech is intolerably intrusive, for instance, if it invades the home or is directed at a captive audience.[15] In most circumstances, the First Amendment does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer; rather, the burden normally falls upon the viewer to avoid further bombardment of his sensibilities simply by averting his eyes.[16] Moreover, under the First Amendment, the Government may not suppress lawful speech as the means to suppress unlawful speech.[17]

The First Amendment does not grant to the press protection from any law which in any fashion or to any degree limits or restricts the right to report truthful information.[18]

The constitutional rights and liberties of speech and press are also subject to the right of judicial tribunals to punish as for contempt where an utterance or publication tends to obstruct the courts in their administration of justice.[19] Also, under its police power, a state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare or safety.[20]

Footnotes

1 § 513.

2 Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).

3 Nevada Com'n on Ethics v. Carrigan, 564 U.S. 117, 131 S. Ct. 2343, 180 L. Ed. 2d 150 (2011).

4 Schenck v. U.S., 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

5 Kovacs v. Cooper, 336 U.S. 77, 69 S. Ct. 448, 93 L. Ed. 513, 10 A.L.R.2d 608 (1949).

6 U.S. v. Schales, 546 F.3d 965 (9th Cir. 2008).

7 U.S. v. Stevens, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); Jenkins v. Rock Hill Local School Dist., 513 F.3d 580, 229 Ed. Law Rep. 40 (6th Cir. 2008).
For further discussion of speech integral to criminal conduct, see § 533.
As to fighting words, see § 522.
As to obscene material, see § 524.

8 Petition of Variable for Change of Name v. Nash, 144 N.M. 633, 2008-NMCA-105, 190 P.3d 354 (Ct. App. 2008).

9 In re Marriage of Evilsizor & Sweeney, 237 Cal. App. 4th 1416, 189 Cal. Rptr. 3d 1 (1st Dist. 2015); State v. Brossart, 2015 ND 1, 858 N.W.2d 275 (N.D. 2015).

10 People v. Limage, 19 Misc. 3d 395, 851 N.Y.S.2d 852 (N.Y. City Crim. Ct. 2008).

11 U.S. v. Fulmer, 108 F.3d 1486, 46 Fed. R. Evid. Serv. 411 (1st Cir. 1997); Lovell By and Through Lovell v. Poway Unified School Dist., 90 F.3d 367, 111 Ed. Law Rep. 116 (9th Cir. 1996).

12 Bates v. State Bar of Arizona, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977).

13 Gibson v. Mayor and Council of City of Wilmington, 355 F.3d 215, 63 Fed. R. Evid. Serv. 1285 (3d Cir. 2004).

That a false report of bomb might be said sarcastically or jokingly or might even be understood as such does not provide constitutional free speech protection so as to avoid prosecution under the statute prohibiting the false report of secretive placement of a bomb or other explosive. Levin v. United Air Lines, Inc., 158 Cal. App. 4th 1002, 70 Cal. Rptr. 3d 535 (2d Dist. 2008), as modified on other grounds, (Jan. 14, 2008).

14 U.S. v. Alvarez, 567 U.S. 709, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012).

15 Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425 (Tex. 1998).

16 Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011), further providing that in public debate, insulting and even outrageous speech must be tolerated, in order to provide adequate breathing space to the freedoms protected by the First Amendment.

17 Packingham v. North Carolina, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017).

18 Cohen v. Cowles Media Co., 501 U.S. 663, 111 S. Ct. 2513, 115 L. Ed. 2d 586 (1991).

19 Am. Jur. 2d, Contempt § 111.

20 § 397.

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16A Am. Jur. 2d Constitutional Law § 519

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(6) Unprotected Utterances

§ 519. Attorney's speech as unprotected utterance

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 2040, 2120

The speech of lawyers who represent clients in pending cases may, consistent with the First Amendment, be regulated under a less demanding standard than that established for regulation of the press, given that (1) such lawyers are key participants in the criminal justice system, and therefore the state may properly demand some adherence to the precepts of that system in regulating such attorneys' speech as well as their conduct; (2) court personnel and attorneys, as officers of the court, have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice; and (3) because lawyers have special access to information through discovery and client communications, lawyers' extrajudicial statements pose a threat to the fairness of a pending proceeding, in that such statements are likely to be received as especially authoritative; the First Amendment does not require a state to demonstrate a clear and present danger of actual prejudice or an imminent threat to fair trial before any discipline may be imposed on a lawyer who initiates a pretrial press conference.[1]

Observation:

In determining whether a rule adopted by a state's highest court to govern lawyers' extrajudicial statements to the press is void for vagueness as interpreted by the state court in a particular case, the question is not whether discriminatory enforcement occurred in the case at hand, but whether the rule is so imprecise that discriminatory enforcement is a real possibility; this inquiry is of particular relevance when one of the classes most affected by the rule is the criminal defense bar, which has the professional mission to challenge actions of the state.[2]

A local court rule prohibiting attorney's speech that has a substantial likelihood of material prejudice on a criminal trial does not violate the First Amendment.[3] Similarly, rules limiting an attorney's right to name potential witnesses do not violate free speech as protected by the First Amendment as long as there is a substantial likelihood of materially prejudicing the judicial process by disseminating the information.[4] However, a federal district court's rule prohibiting an attorney's public statements on subjects including the defendant's criminal record, the existence of a confession, the credibility of prospective witnesses, and so on cannot be read as imposing categorical prohibitions but rather constitutes examples of subjects likely to be materially prejudicial, and unprotected by the First Amendment, if spoken about.[5]

Observation:

The "substantial likelihood of material prejudice" standard provides sufficient constitutional protection for attorney's speech about pending cases in which they are involved, in light of their status as key participants in the justice system; the "clear and present danger" standard need not be applied.[6]

A lawyer cannot be punished for activity or speech that is protected by the First Amendment.[7] However, attorney's speech that is otherwise entitled to full constitutional protection may nonetheless be sanctioned if it obstructs or prejudices the administration of justice.[8] In the courtroom itself, during a judicial proceeding, whatever right to free speech an attorney has is extremely circumscribed;[9] an attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal.[10]

An attorney's abusive and insulting comments in a postverdict private letter to jurors qualify as a political speech warranting constitutional protection.[11] However, statements by an attorney that are outside of any community concern, and are merely designed to ridicule or exhibit contumacy toward the legal system, are not protected under the constitutional right of free speech.[12]

Observation:

A sanction order banning an attorney from the third floor of a federal courthouse does not violate the attorney's First Amendment right to free speech in light of evidence that the attorney was a threat to public safety.[13]

Footnotes

1 Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).

2 Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720, 115 L. Ed. 2d 888 (1991).

3 U.S. v. Wecht, 484 F.3d 194 (3d Cir. 2007), as amended on other grounds, (July 2, 2007).

4 U.S. v. Megale, 235 F.R.D. 151 (D. Conn. 2006).

5 U.S. v. Wecht, 484 F.3d 194 (3d Cir. 2007), as amended on other grounds, (July 2, 2007).

6 Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425 (Tex. 1998).

7 People v. Ziankovich, 433 P.3d 640 (Colo. O.P.D.J. 2018).

8 Underwood v. BNSF Railway Company, 359 F. Supp. 3d 953 (D. Mont. 2018).

9 In re Hawver, 300 Kan. 1023, 339 P.3d 573 (2014).

10 Patterson v. GEICO General Ins. Co., 347 P.3d 562 (Alaska 2015); In re McCool, 172 So. 3d 1058 (La. 2015).

11 Commission for Lawyer Discipline v. Benton, 980 S.W.2d 425 (Tex. 1998).

12 Lawyer Disciplinary Bd. v. Hall, 234 W. Va. 298, 765 S.E.2d 187 (2014).

13 In re Prewitt, 84 Fed. Appx. 397 (5th Cir. 2003).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

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(6) Unprotected Utterances

§ 520. Disclosure of classified or confidential information as unprotected utterance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1545

A.L.R. Library

Invocation and Effect of State Secrets Privilege, 23 A.L.R.6th 521

Governmental restrictions on the disclosure of classified or confidential information, such as an authorization for a wiretap in a government investigation of criminal activity, are not, when concerned with a government official who has voluntarily assumed a duty of confidentiality, subject to the same stringent standards, under the Federal Constitution's First Amendment, that would be applied to efforts to impose restrictions on unwilling members of the public.[1]

Observation:

A city's contention that its interest in the efficient operation of the city social services and child welfare agencies depended on keeping certain information about clients and informants confidential does not justify the broad First Amendment restrictions imposed on city employees by the agencies' press policies, requiring employees to obtain permission before speaking to the media regarding any policies or activities of an agency, absent any showing that agency operations had been or would be impacted by the inadvertent disclosure of confidential information by the employees.[2]

Footnotes

1 U.S. v. Aguilar, 515 U.S. 593, 115 S. Ct. 2357, 132 L. Ed. 2d 520 (1995).

2 Harman v. City of New York, 140 F.3d 111 (2d Cir. 1998).

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IX. Fundamental Constitutional Rights and Privileges

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§ 521. Disrespect or burning of United States flag as protected utterance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1545, 1866

A.L.R. Library

Validity, and Standing to Challenge Validity, of State Statute Prohibiting Flag Desecration and Misuse, 31 A.L.R.6th 333

Utterances showing a disrespect for the flag of the United States are, according to the Supreme Court, protected by the right of free speech.[1] Flag-burning as a mode of expression also enjoys the full protection of the First Amendment, and the Supreme Court has invalidated on First Amendment grounds prosecutions of persons violating statutes prohibiting flag desecration.[2]

The right of free speech is also violated by the action of a state board of education in requiring public school pupils to salute the flag of the United States while reciting a pledge of allegiance.[3]

Footnotes

1 Street v. New York, 394 U.S. 576, 89 S. Ct. 1354, 22 L. Ed. 2d 572 (1969).
For a general discussion of regulations and offenses pertaining to the United States flag and state flags and emblems, see Am. Jur. 2d, Flag §§ 1 to 4.

2 U.S. v. Eichman, 496 U.S. 310, 110 S. Ct. 2404, 110 L. Ed. 2d 287 (1990); Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

3 Am. Jur. 2d, Schools § 288.

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1. First Amendment Rights Guaranteed by Constitution

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(6) Unprotected Utterances

§ 522. "Fighting words" as unprotected utterance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1562

"Fighting words," that is, those personally abusive epithets which when addressed to an ordinary citizen are, as a matter of common knowledge, inherently likely to provoke a violent reaction, are generally proscribable under the First Amendment.[1] "Fighting words," which may be regulated without violating the First Amendment, is a small class of expressive conduct that is likely to provoke the average person to retaliate and thereby cause a breach of the peace; where a reasonable onlooker would regard expressive conduct as a direct personal insult or an invitation to exchange fisticuffs, such speech is deemed not entitled to First Amendment protection. In determining whether a message constitutes fighting words, and may be regulated without violating the First Amendment, a court is required to consider carefully the actual circumstances surrounding its display and ask whether the expression is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[2] A state may constitutionally punish "fighting words"[3]—that is, words which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace[4]—under carefully drawn statutes or ordinances which, by their own terms or as construed by the state's courts,[5] are limited in their application to "fighting words" only, and are not susceptible of application to protected expression.[6]

The context in which words were delivered is key in determining whether they would be viewed as a First Amendment protected expression of opinion, as opposed to fighting words.[7] It is necessary to determine whether an average addressee in the

circumstances of the actual addressee would likely react violently to the words;[8] it is the tendency or likelihood of the words to provoke violent reaction that is the touchstone of the fighting-words test, and both the content and the context of the speech are relevant considerations to that determination.[9]

An evangelist's comments at a state university campus, directed at a woman who identified herself as both Christian and lesbian, including "Christian lesbo," "lesbian for Jesus," "do you lay down with dogs," and "are you a bestiality lover," constituted fighting words and are not protected by the First Amendment.[10] On the other hand, a Christian cross erected by the Knight Riders of the Ku Klux Klan, bearing the words "John 3:16," does not constitute "fighting words," and preventing its display in a public forum would violate the First Amendment.[11]

A city ordinance which is not limited to fighting words, or to obscene or opprobrious language, but prohibits speech that "in any manner" interrupts a police officer in the performance of his or her duties is deemed unconstitutionally overbroad because the law provides the police with unfettered discretion to arrest individuals for words or conduct that merely annoyed or offended them.[12] Also, a statute criminalizing the wearing or display of any indicia of a law enforcement officer if it would cause a reasonable person to be deceived is impermissibly content-based and proscribes conduct protected by the state and Federal Constitutions.[13]

Footnotes

1 Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); Watters v. Otter, 986 F. Supp. 2d 1162 (D. Idaho 2013); Nolan v. Krajcik, 384 F. Supp. 2d 447 (D. Mass. 2005); Ghaster v. City of Rocky River, 913 F. Supp. 2d 443 (N.D. Ohio 2012).

2 Knight Riders of Ku Klux Klan v. City of Cincinnati, 72 F.3d 43, 1995 FED App. 0378P (6th Cir. 1995).

3 R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992); Ford v. State, 127 Nev. 608, 262 P.3d 1123, 127 Nev. Adv. Op. No. 55 (2011).

4 Lewis v. City of New Orleans, 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974).

5 Lewis v. City of New Orleans, 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974).

6 Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); Lewis v. City of New Orleans, 415 U.S. 130, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974).

7 Klen v. City of Loveland, Colo., 661 F.3d 498 (10th Cir. 2011).

8 In re Nickolas S., 226 Ariz. 182, 245 P.3d 446, 263 Ed. Law Rep. 419 (2011).

9 State v. Drahota, 280 Neb. 627, 788 N.W.2d 796 (2010).

10 Gilles v. Davis, 427 F.3d 197 (3d Cir. 2005).

11 Knight Riders of Ku Klux Klan v. City of Cincinnati, 72 F.3d 43, 1995 FED App. 0378P (6th Cir. 1995).

12 City of Houston, Tex. v. Hill, 482 U.S. 451, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987).

13 Rodriguez v. State, 906 So. 2d 1082 (Fla. 3d DCA 2004), decision aff'd, 920 So. 2d 624 (Fla. 2005).

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§ 523. Incitement to crime as unprotected utterance; breach of peace

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1545, 1801, 1813

A.L.R. Library

First Amendment guaranty of freedom of speech or press as defense to liability stemming from speech allegedly causing bodily injury, 94 A.L.R. Fed. 26

Validity, construction, and application of Federal Anti-Riot Act of 1968 (18 U.S.C.A. secs. 2101, 2102), 22 A.L.R. Fed. 256

Validity, construction, and application of Civil Obedience Act of 1968 (18 U.S.C.A. secs. 231-233) punishing certain acts in connection with civil disorders, 16 A.L.R. Fed. 906

Where speech is an integral part of unlawful conduct, it has no constitutional protection.[1] The right of free speech contemplates the advocacy of legal and constitutional means to bring about changes in governments, and the right is lost when it is abused by urging the use of illegal and unconstitutional methods.[2] As a matter of principle, it has been recognized that utterances tending to incite to crime may be punished without infringing constitutional rights.[3] Indeed, the constitutional right of freedom of speech

does not confer the right to persuade others to violate the law.[4] It has also been recognized that the right of free speech does not render immune utterances tending to incite an immediate breach of the peace or disorderly conduct[5] or riot.[6] Also, the probable reaction of the listeners to a speech is not a content-neutral basis for the regulation of speech in a public forum; speech cannot be financially burdened simply because it might offend a hostile mob.[7]

However, the constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation, except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[8] The First Amendment permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality, and a state may punish those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[9]

The government may suppress speech for advocating the use of force or a violation of law only if such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[10] Mere speculation about danger is not an adequate basis on which to justify restriction of speech.[11] The government may not prohibit speech because it increases the chance that an unlawful act will be committed at some indefinite future time;[12] the mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it,[13] and the prospect of crime, by itself, does not justify laws suppressing protected speech.[14]

There is also a wide difference between incitement to crime and mere advocacy of law violation. A state and its courts may not make criminal the peaceful expression of unpopular views, and a conviction for breach of the peace may not stand if based either on the ground that the speech stirred people to anger, on the ground that it invited public dispute, or on the ground that it brought about a condition of unrest,[15] and public gatherings, even where arguably of such a nature as to justify governmental intervention, may not be prevented by a prior restraint such as an ex parte court order, without notice to, and a hearing of, those affected thereby.[16]

A state's power to punish incitement may vary with the nature of the speech, whether persuasive or coercive, the nature of the wrong induced, whether violent or merely offensive to the morals, and the degree of probability that the substantive evil actually will result.[17] The conviction of a defendant for uttering the words "fuck you" as a violation of an ordinance proscribing offensive language calculated to provoke a breach of the peace, violates the defendant's constitutional rights, where there was no breach of the peace and where the utterance took place at a university campus meeting during outbursts of the defendant and others in response to political opinions and the voicing of contrary opinions.[18] Likewise, stated opposition to the war in Vietnam and the approval of those attempting to avoid the draft are not such incitements to crime as would permit a state legislature to bar a duly elected representative from occupying his seat.[19]

Observation:

The First Amendment "pure speech" rights of the defendants are not violated by the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) and the International Emergency Economic Powers Act (IEEPA), criminalizing speech tending to show conspiracies in aid of terrorism, the defendants' agreement to participate in conspiracies, their level of participation or role in them, and their criminal intent.[20]

Footnotes

1 McNally v. Bredemann, 2015 IL App (1st) 134048, 391 Ill. Dec. 287, 30 N.E.3d 557 (App. Ct. 1st Dist. 2015).

2 People v. Gitlow, 234 N.Y. 132, 136 N.E. 317 (1922), aff'd, 268 U.S. 652, 45 S. Ct. 625, 69 L. Ed. 1138 (1925) and (overruled in part on other grounds by, People v. Epton, 19 N.Y.2d 496, 281 N.Y.S.2d 9, 227 N.E.2d 829 (1967)).

3 Musser v. Utah, 333 U.S. 95, 68 S. Ct. 397, 92 L. Ed. 562 (1948).

4 U.S. v. Fleschner, 98 F.3d 155 (4th Cir. 1996).

5 Colten v. Kentucky, 407 U.S. 104, 92 S. Ct. 1953, 32 L. Ed. 2d 584 (1972).

6 Carroll v. President and Com'rs of Princess Anne, 393 U.S. 175, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968).

7 Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101, 75 Ed. Law Rep. 29 (1992).

8 Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

9 Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

10 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

11 Saieg v. City of Dearborn, 641 F.3d 727 (6th Cir. 2011).

12 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

13 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

14 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

15 Gregory v. City of Chicago, 394 U.S. 111, 89 S. Ct. 946, 22 L. Ed. 2d 134 (1969).

16 Carroll v. President and Com'rs of Princess Anne, 393 U.S. 175, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968).

17 Shuttlesworth v. City of Birmingham, Ala., 373 U.S. 262, 83 S. Ct. 1130, 10 L. Ed. 2d 335 (1963).

18 Ware v. City and County of Denver, 182 Colo. 177, 511 P.2d 475 (1973).

19 Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339, 17 L. Ed. 2d 235 (1966).

20 U.S. v. Al-Arian, 308 F. Supp. 2d 1322 (M.D. Fla. 2004).

16A Am. Jur. 2d Constitutional Law § 524

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Constitutional Law
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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(6) Unprotected Utterances

§ 524. Obscene matter as unprotected utterance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 2189 to 2191

A.L.R. Library

Regulation of exposure of female, but not male, breasts, 67 A.L.R.5th 431

Validity, construction, and effect of statutes or ordinances prohibiting the sale of obscene materials to minors, 93 A.L.R.3d 297

Modern concept of obscenity, 5 A.L.R.3d 1158

Validity, Construction, and Application of Federal Enactments Proscribing Obscenity and Child Pornography or Access Thereto on the Internet, 7 A.L.R. Fed. 2d 1

Validity, construction, and application of federal criminal statute (18 U.S.C.A. sec. 1464) punishing utterance of obscene, indecent, or profane, language by means of radio communication, 17 A.L.R. Fed. 900

Validity, construction, and application of provisions of Postal Reorganization Act of 1970 (18 U.S.C.A. secs. 1735-1737; 39 U.S.C.A. secs. 3010, 3011) (so-called "Goldwater Amendment") prohibiting mailing of sexually oriented advertisements to persons who have notified postal service that they wish to receive no such material, 15 A.L.R. Fed. 488

Obscenity is not within the area of constitutionally protected speech or press.[1] "Obscene speech," sexually explicit material that violates fundamental notions of decency, is not protected by the First Amendment.[2] Indeed, speech that is obscene may be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas.[3]

Commercial exposure and the sale of obscene materials to anyone, including consenting adults, is not constitutionally protected and is subject to state regulation,[4] and there is no constitutional barrier to prohibiting communications that are obscene in some communities under local standards, even though they are not obscene in others.[5]

As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear, but the freedom of speech has its limits; it does not embrace certain categories of speech, including obscenity, and pornography produced with real children;[6] while the First Amendment protects nonobscene sexually explicit material involving adults, it does not protect pornographic material involving children.[7] Under the free speech provision of the First Amendment, there is a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles.[8]

The governing three-part test for assessing whether material is obscene, and unprotected by the First Amendment looks at whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and, whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[9] Sexual expression is obscene and outside the protection of the First Amendment if it meets all three of the following requirements: (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interests; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and (3) the work, taken as a whole, lacks serious literary artistic, political, or scientific value.[10] Obscene speech unprotected by the First Amendment must be, in some significant way, erotic.[11]

Observation:

Obscenity offenses may be used as predicate acts under a state's RICO statute, even though the stiff penalties permitted under the RICO statute might cause some booksellers to practice self-censorship and to remove materials that are actually protected by the First Amendment from their shelves.[12]

With regard to the scope of regulation of obscene material permissible under the First Amendment, the United States Supreme Court does not undertake to tell the states what they must do but rather undertakes to define the area in which they may chart their own course in dealing with obscene material.[13] Nevertheless, a state is not free to adopt whatever procedures it pleases for dealing with obscenity without regard to the possible consequences for constitutionally protected speech.[14]

The First and 14th Amendments prohibit making the mere private possession of obscene material a crime;[15] however, the right to private possession of obscene material is restricted to possession in one's home[16] and this right does not create correlative rights to give, receive, distribute, sell, transport, or import obscene material, even though such activities are to result only in private use or possession.[17] The constitutional right to possess obscene material in the privacy of one's home depends on the right to privacy in the home,[18] not on any First Amendment right to purchase or possess obscene materials.[19] Not only may the government prohibit the communication[20] or importation of obscene materials for commercial distribution,[21] but it may also constitutionally prohibit the importation of obscene material even though the importer claims that such material is for private, personal use and possession only.[22]

The Children's Internet Protection Act, under which a public library cannot receive federal assistance to provide Internet access, unless it installed software to block obscene or pornographic images and to prevent minors from obtaining access to harmful material, does not violate the First Amendment free speech clause; it is deemed reasonable, given the quantity of material on the Internet and the library's traditional role in identifying material suitable for inclusion, for the library to exclude certain categories of content, even though filtering software tended to erroneously block some constitutionally protected speech outside the categories intended to be blocked, and if a patron encountered a blocked site, he or she needed only to ask a librarian to unblock it or, at least in the case of adults, disable the filter.[23] This Act does not impose an impermissible condition on public libraries in violation of the First Amendment by requiring libraries, as a condition of the receipt of federal assistance to provide Internet access, to install software to block obscene or pornographic images and to prevent minors from obtaining access to harmful material; the federal assistance programs are intended to help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes, and Congress can validly insist that these public funds be spent for the purposes for which they were authorized.[24] On the other hand, the Communications Decency Act, which provides protection for the private blocking and screening of offensive material, does not provide immunity to a county library board of trustees, and its individual members, in a civil rights action brought by library patrons alleging that the board's enforcement of its policy of blocking access to adult-oriented Internet sites from the library computers violated their First Amendment free speech rights.[25]

A textual e-mail exchanged by members of an e-group associated with an Internet site containing downloadable child pornography is not protected speech where the messages facilitated, inter alia, the members' meeting and talking with sexually exploited children, and the vast majority of all-text messages sent to members were generated automatically to alert members to new uploaded files.[26]

A statute prohibiting knowingly possessing a computer, computer disks, and other materials containing images of child pornography that are mailed, shipped, and transported in interstate commerce does not violate the First Amendment.[27]

A state statute criminalizing the sale, rental, or loan to juveniles of an "electronic file or message containing an image" or an "electronic file or message containing words" depicting sexually harmful material was not narrowly tailored to promote the government's compelling interest in protecting minors from such material, and violates the First Amendment, where the statute provides no defense to the web sites which provide measures to exclude minors, adults would be substantially burdened from accessing protected material on the Internet by having to contend with the exclusionary measure that the web sites would use, the statute burdened bulletin boards, newsgroups, and commercial web sites consisting mostly of material suitable for minors, and the statute would not effectively stop the content originating from other countries.[28]

Footnotes

1 U.S. v. Orito, 413 U.S. 139, 93 S. Ct. 2674, 37 L. Ed. 2d 513 (1973); U.S. v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 93 S. Ct. 2665, 37 L. Ed. 2d 500 (1973).
As to the definition and tests of obscenity, see Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 1 to 12.
As to the obscene character of particular matters and activities, see Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 15 to 31.

2 U.S. v. Williams, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008).

3 Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007).

4 Kaplan v. California, 413 U.S. 115, 93 S. Ct. 2680, 37 L. Ed. 2d 492 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973).

5 Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989).

6 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

7 People v. Fraser, 96 N.Y.2d 318, 728 N.Y.S.2d 115, 752 N.E.2d 244 (2001).

8 State v. Theriault, 158 N.H. 123, 960 A.2d 687 (2008).

9 Ashcroft v. American Civil Liberties Union, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002).

10 2025 Emery Highway, L.L.C. v. Bibb County, Georgia, 377 F. Supp. 2d 1310 (M.D. Ga. 2005), aff'd, 218 Fed. Appx. 869 (11th Cir. 2007).

11 State v. Suhn, 2008 SD 128, 759 N.W.2d 546 (S.D. 2008).

12 Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 109 S. Ct. 916, 103 L. Ed. 2d 34 (1989).

13 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973).

14 McKinney v. Alabama, 424 U.S. 669, 96 S. Ct. 1189, 47 L. Ed. 2d 387 (1976).
Generally, as to the validity of statutes and procedures designed to protect the public from obscenity, see Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 13, 14.
As to prosecutions for obscenity, lewdness, or indecency, see Am. Jur. 2d, Lewdness, Indecency, and Obscenity §§ 32 to 43.

15 Stanley v. Georgia, 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969).

16 Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973).

17 U.S. v. Orito, 413 U.S. 139, 93 S. Ct. 2674, 37 L. Ed. 2d 513 (1973); U.S. v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 93 S. Ct. 2665, 37 L. Ed. 2d 500 (1973).

18 As to the right to privacy, generally, see §§ 648 to 656.

19 U.S. v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 93 S. Ct. 2665, 37 L. Ed. 2d 500 (1973).

20 Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989).

21 U. S. v. Thirty-Seven (37) Photographs, 402 U.S. 363, 91 S. Ct. 1416, 28 L. Ed. 2d 822 (1971).

22 U.S. v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 93 S. Ct. 2665, 37 L. Ed. 2d 500 (1973).

23 U.S. v. American Library Ass'n, Inc., 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003).

24 U.S. v. American Library Ass'n, Inc., 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003).

25 Mainstream Loudoun v. Board of Trustees of Loudoun County Library, 2 F. Supp. 2d 783 (E.D. Va. 1998).

26 U.S. v. Martin, 426 F.3d 83 (2d Cir. 2005).

27 U.S. v. Peterson, 294 F. Supp. 2d 797 (D.S.C. 2003), aff'd, 145 Fed. Appx. 820 (4th Cir. 2005).

28 PSINET, Inc. v. Chapman, 167 F. Supp. 2d 878 (W.D. Va. 2001), aff'd, 362 F.3d 227 (4th Cir. 2004).

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16A Am. Jur. 2d Constitutional Law § 525

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Constitutional Law

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(6) Unprotected Utterances

§ 525. Obstruction of war measures as unprotected utterance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1860

A.L.R. Library

Validity, Construction, and Application of Solomon Amendment, Which Denies Federal Funding to Institutions of Higher Education that Prohibit Military Representatives Access to and Assistance for Recruiting Purposes, 5 A.L.R. Fed. 2d 551

The government's power to enact statutes, the effect of which is to curtail free speech, is greater in time of war than in time of peace because war opens dangers that do not exist at other times.[1] When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured as long as the war is being fought, and no court can regard them as protected by any constitutional right.[2] To the end that war may not result in defeat, the freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the military forces may not be broken by seditious utterances; the freedom of the press may be curtailed so as to preserve military plans and movements from the knowledge of the enemy.[3]

A statute which makes it a criminal offense for any person, when the United States is at war, willfully to make or convey false reports or false statements with the intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, or willfully to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the Armed Forces, or willfully to obstruct the enlistment or recruiting service of the United States, to the injury of the service of the United States,[4] has been held not to infringe the constitutional guarantees of freedom of speech or of the press, particularly in view of the stricter limitations of those freedoms during time of war.[5]

Footnotes

1 Abrams v. U.S., 250 U.S. 616, 40 S. Ct. 17, 63 L. Ed. 1173 (1919).

2 Schenck v. U.S., 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

3 U.S. v. Macintosh, 283 U.S. 605, 51 S. Ct. 570, 75 L. Ed. 1302 (1931) (overruled in part on other grounds by, Girouard v. U.S., 328 U.S. 61, 66 S. Ct. 826, 90 L. Ed. 1084 (1946)).

4 18 U.S.C.A. § 2388.

5 Am. Jur. 2d, Sedition, Subversive Activities, and Treason § 9.

16A Am. Jur. 2d Constitutional Law § 526

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(6) Unprotected Utterances

§ 526. Threat or "true threat," and "terroristic threat" as unprotected utterances, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1829 to 1832, 1834

A.L.R. Library

Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949

Validity, Construction, and Application of 18 U.S.C.A. s879, Prohibiting Threats Against Former Presidents or Vice Presidents and Major Candidates for Such Offices, Members of Their Immediate Families, Members of Immediate Families of Presidents-Elect and Vice Presidents-Elect, and Certain Others Protected by Secret Service, 69 A.L.R. Fed. 2d 151

Validity, construction, and application of 18 U.S.C.A. sec. 875(c), prohibiting transmission in interstate commerce of any communication containing any threat to kidnap any person or any threat to injure the person of another, 34 A.L.R. Fed. 785

The First Amendment free speech protections do not extend to certain types of speech, such as "true threats," because such speech is of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[1] Stated somewhat differently, some categories of speech are likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest, and these categories

include "true threats," which the states, consistent with the First Amendment, may prohibit.[2] A statement qualifies as a "true threat," unprotected by the First Amendment, if it is a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.[3] It must, according to its language and context, convey a gravity of purpose and likelihood of execution so as to constitute speech beyond the pale of protected vehement, caustic, unpleasantly sharp attacks on government and public officials.[4] A "true threat" is an expression of an intention to inflict evil, injury, or damage on another and such speech receives no First Amendment protection.[5] In distinguishing between true threats and protected speech, a court asks whether those who hear or read the threat reasonably consider that an actual threat has been made.[6] The First Amendment permits a state to ban "true threats," and the speaker need not actually intend to carry out the threat; rather, the prohibition on true threats protects individuals from fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.[7] For First Amendment purposes, in the context of a threat of physical violence, whether a particular statement may properly be considered to be a threat is governed by an objective standard, that is, whether a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of the intent to harm or assault.[8] A true threat, where a reasonable person would foresee that the listener will believe he or she will be subject to physical violence upon his or her person, is not protected by the First Amendment.[9] A "threat," which is not protected speech under the free speech provision of the Constitution, instills in the addressee a fear of imminent and serious personal violence from the speaker, it is unequivocal, and it is objectively likely to be followed by unlawful acts; it excludes the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee.[10]

Statutes punishing "terroristic threats" or acts have been sustained as not violative of the First Amendment right to free speech.[11]

Statements which are made in jest, or communicated to a large audience, or political in nature, or conditioned on an event that would never happen are statements more likely to be found to be speech protected by the First Amendment rather than a true threat; whether a statement is made anonymously may, depending on the circumstances of the case, increase or decrease the likelihood that an reasonable listener would infer the existence of a true threat.[12]

While the government may outlaw threats, the First Amendment does not permit the government to punish speech merely because the speech is forceful or aggressive, since what is offensive to some is passionate to others.[13] However, a statute may criminalize threats without violating the First Amendment, even without a requirement of immediacy or imminence, if it includes a requirement of specific intent and a present or apparent ability to carry out the threat.[14]

CUMULATIVE SUPPLEMENT

Cases:

Forum in which defendant posted his alleged threats against district attorney did not support finding that defendant's social media posts constituted true threats that were unprotected by First Amendment, in prosecution for threatening to kill a court officer; defendant posted alleged threats in context of heated discussion about political concern taking place on social media site that had status of a public square but included atmosphere of like-minded community, such that site was highly important place for the exchange of political views, and it was common for political posts on social media site to be over the top, exaggeratedly offensive, or irrational. U.S. Const. Amend. 1. State v. Taylor, 841 S.E.2d 776 (N.C. Ct. App. 2020), writ allowed, 847 S.E.2d 878 (N.C. 2020) and review allowed, 847 S.E.2d 412 (N.C. 2020).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. Fulmer, 108 F.3d 1486, 46 Fed. R. Evid. Serv. 411 (1st Cir. 1997); Levin v. United Air Lines, Inc., 158 Cal. App. 4th 1002, 70 Cal. Rptr. 3d 535 (2d Dist. 2008), as modified, (Jan. 14, 2008).

2 In re Robert T., 2008 WI App 22, 307 Wis. 2d 488, 746 N.W.2d 564 (Ct. App. 2008).

3 Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); U.S. v. Parr, 545 F.3d 491 (7th Cir. 2008); Corales v. Bennett, 567 F.3d 554, 244 Ed. Law Rep. 1045 (9th Cir. 2009); U.S. v. Bradbury, 111 F. Supp. 3d 918 (N.D. Ind. 2015); Levin v. United Air Lines, Inc., 158 Cal. App. 4th 1002, 70 Cal. Rptr. 3d 535 (2d Dist. 2008), as modified on other grounds, (Jan. 14, 2008).

4 U.S. v. Dillard, 795 F.3d 1191 (10th Cir. 2015).

5 Corales v. Bennett, 567 F.3d 554, 244 Ed. Law Rep. 1045 (9th Cir. 2009);
Fogel v. Collins, 531 F.3d 824 (9th Cir. 2008).

6 U.S. v. Jongewaard, 567 F.3d 336 (8th Cir. 2009); Riehm v. Engelking, 538 F.3d 952, 236 Ed. Law Rep. 65 (8th Cir. 2008); Fogel v. Collins, 531 F.3d 824 (9th Cir. 2008); U.S. v. Wheeler, 776 F.3d 736 (10th Cir. 2015).

7 Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); U.S. v. Wheeler, 776 F.3d 736 (10th Cir. 2015).

8 State v. Cook, 287 Conn. 237, 947 A.2d 307 (2008).

9 State v. Cook, 287 Conn. 237, 947 A.2d 307 (2008).

10 Goodness v. Beckham, 224 Or. App. 565, 198 P.3d 980 (2008).

11 Masson v. Slaton, 320 F. Supp. 669 (N.D. Ga. 1970); Lanthrip v. State, 235 Ga. 10, 218 S.E.2d 771 (1975).

12 U.S. v. Dillard, 835 F. Supp. 2d 1120 (D. Kan. 2011).

13 U.S. v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996).

14 People v. Dunkle, 36 Cal. 4th 861, 32 Cal. Rptr. 3d 23, 116 P.3d 494 (2005) (disapproved of on other grounds by, People v. Doolin, 45 Cal. 4th 390, 87 Cal. Rptr. 3d 209, 198 P.3d 11 (2009)).

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16A Am. Jur. 2d Constitutional Law § 527

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(6) Unprotected Utterances

§ 527. Seditious, subversive, or treasonous activities or utterances

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1862, 1863

The Supreme Court has recognized that the right of free speech does not prohibit the punishment of utterances which threaten the overthrow of the government by unlawful means.[1] However, this broad principle must be qualified by the requirements that there must be a clear and present danger to the government,[2] or that the advocacy of such unlawful acts must be directed to inciting or producing imminent lawless action and must be likely to incite or produce such action.[3] Moreover, even though the state may penalize utterances which threaten the overthrow of the government by unlawful means, a statute is invalid as infringing the right of free speech where it permits punishment for utterances made innocently with no intent to induce a resort to violence.[4]

Observation:

The so-called *Brandenburg*[5] test, under which the government may punish the advocacy of illegal conduct only where such advocacy is directed to inciting or producing imminent lawless acts and is likely to incite or produce such action, applies to laws that forbid inciting someone else to use violence against third parties but does not apply to statutes that prohibit someone from

directly threatening another person.[6] Under the *Brandenburg* standard, advocacy may be punished only if it is directed to inciting or producing imminent lawless action and is likely to incite or produce such action; the government must establish a knowing affiliation and specific intent to further those illegal aims.[7]

The authority of the federal government to regulate and punish sedition and related offenses,[8] subversive activities and matters affecting internal threats to national security,[9] and treason[10] has never been seriously questioned. In a celebrated case involving treason alleged to have occurred during World War II, the First Amendment did not prevent the conviction of an American citizen for words spoken on a German broadcast, since the words were spoken to give comfort to the enemy.[11] The constitutionality of the Espionage Act[12] has been upheld, and it has been said that the communication of secret defense material to a foreign nation cannot, by any far-fetched reasoning, be included within the area of First Amendment protected speech.[13] Also, this constitutional right is not violated by a provision in a federal statute for the deportation of any alien who was, at the time of entering the United States, or had been at any time thereafter a member of an organization that taught or advocated the overthrow of the government by force.[14]

Footnotes

1 Stromberg v. People of State of Cal., 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117, 73 A.L.R. 1484 (1931).

2 Whitney v. California, 274 U.S. 357, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (overruled in part on other grounds by, Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969)).
For discussion of the "clear and present danger" doctrine, see § 515.

3 As to the rule regarding advocacy of unlawful acts, see § 517.

4 Herndon v. Lowry, 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937).

5 Brandenburg v. Ohio, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

6 U.S. v. Dinwiddie, 76 F.3d 913 (8th Cir. 1996).

7 American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995).

8 Am. Jur. 2d, Sedition, Subversive Activities, and Treason §§ 3 to 13.

9 Am. Jur. 2d, Sedition, Subversive Activities, and Treason §§ 50 to 58.

10 Am. Jur. 2d, Sedition, Subversive Activities, and Treason §§ 59 to 79.

11 Gillars v. U.S., 182 F.2d 962 (D.C. Cir. 1950).

12 18 U.S.C.A. §§ 792 to 799.

13 Am. Jur. 2d, Sedition, Subversive Activities, and Treason §§ 17, 18.

14 Harisiades v. Shaughnessy, 342 U.S. 580, 72 S. Ct. 512, 96 L. Ed. 586 (1952).

16A Am. Jur. 2d Constitutional Law § 528

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(7) Expressive Conduct or Symbolic or Nonverbal Speech

§ 528. Expressive conduct or symbolic or nonverbal speech, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1490, 1492, 1497, 1580, 1655, 1670, 1671, 1866

Although the First Amendment protects speech only, conduct may be sufficiently imbued with elements of communication to fall within the ambit of the First Amendment.[1] The First Amendment protects more than just the spoken and written word; it also protects expressive conduct so long as that conduct conveys a particularized message and is likely to be understood in the surrounding circumstances.[2]

Observation:

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word, but it may not proscribe particular conduct because it has expressive elements; a law directed at the communicative nature of conduct must, like laws directed at speech itself, be justified by a substantial showing of need that the First Amendment requires.[3]

A message may be delivered by conduct that is intended to be communicative and that in context would reasonably be understood by a viewer to be communicative. Symbolic expression of this kind may be forbidden or regulated only if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech.[4] A governmental regulation is sufficiently justified, despite its incidental impact upon expressive conduct protected by the First Amendment, if it is within the constitutional power of the government; it furthers an important or substantial governmental interest; the governmental interest is unrelated to the suppression of free speech; and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[5]

Observation:

The First Amendment perception and intent analysis to determine whether certain "speech" is constitutionally protected is not necessary when printed or spoken words, as opposed to symbolic expressions, are used.[6]

In determining whether conduct was "expressive conduct," a court must ask whether a reasonable person would interpret it as some sort of message, not whether an observer would necessarily infer a specific message.[7] Also, in deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, the test is whether an intent to convey a particularized message was present, and whether the likelihood is great that the message would be understood by those who viewed it.[8] Moreover, in determining whether conduct is expressive and entitled to constitutional protection, an inquiry is required into whether the activity is sufficiently imbued with the elements of communication to fall within the scope of the free speech clause, for not all conduct may be viewed as speech simply because by his or her conduct the actor intends to express an idea.[9] Indeed, conduct that is ordinarily expressive may not be intended to express any message in some circumstances and therefore would not be entitled to First Amendment protection.[10]

The protections afforded under the free speech provision of the First Amendment not only protect verbal speech[11] but also nonverbal speech,[12] characterized as expressive conduct[13] or symbolic speech,[14] such as, the use of funds to support a political candidate,[15] the display of a flag[16] or signs and banners,[17] or a mode of dress or personal grooming,[18] such as wearing a beard or a certain hair style[19] or having a tattoo;[20] or by mere silent and reproachful presence in a public place.[21]

Observation:

Because computer source code is an expressive means for the exchange of information and ideas about computer programming, it is protected by the First Amendment.[22]

A county public library employee's outward display of a cross pendant while at work, which the employee testified she wore "to give witness to [her] religious faith," constitutes expressive conduct as required for protection under the First Amendment's free speech clause.[23] Likewise, street vendors' sale of clothing painted with custom designs constitutes protected expression under the First Amendment where the merchandise sold by the vendors for varying amounts depending upon the amount of time and effort needed to apply the requested design, had a predominantly expressive purpose, and the vendor-artists' stated motivation was communicating ideas.[24] However, having sex, without more, is not expressive conduct protected by the First Amendment.[25]

A city ordinance prohibiting people from sitting or lying on public sidewalks in certain commercial areas between 7a.m. and 9 p.m. is not facially invalid since the ordinance does not by its terms seek to regulate spoken words or patently expressive or communicative conduct such as picketing but rather prohibited only the acts of sitting or lying on the sidewalk, neither of which is integral to or commonly associated with expression.[26]

Masks worn by members of an unincorporated political association advocating on behalf of the white race and the Christian faith do not constitute expressive conduct entitled to First Amendment protection; while the robe, mask, and hood worn by the members are expressive in that they identify the wearer with a like-minded organization founded in the mid-1860s, the mask does not convey a message independently of the robe and hood, and therefore the expressive force of the mask is deemed redundant, particularly since mask wearing appeared to be, to some extent, optional among the members.[27]

Eruv, or the ceremonial demarcation of an area established by Orthodox Jewish residents by affixing lechis, or religiously significant items, to utility poles, cannot be deemed expressive conduct protected by the First Amendment simply because some borough residents who are not Orthodox Jews, and who would not be intended recipients even if lechis were meant to send a message, discerned unintended messages from eruv, since the conduct's expressive nature is not dependent upon how observers perceived it.[28]

CUMULATIVE SUPPLEMENT

Cases:

Jogger's communicative activities while out on run were protected by First Amendment, even though her jogging itself was not expressive activity. U.S. Const. Amend. 1. McCraw v. City of Oklahoma City, 973 F.3d 1057 (10th Cir. 2020).

[END OF SUPPLEMENT]

Footnotes

1 State v. Immelt, 150 Wash. App. 681, 208 P.3d 1256 (Div. 1 2009), rev'd on other grounds, 173 Wash. 2d 1, 267 P.3d 305 (2011).

2 Kaahumanu v. Hawaii, 682 F.3d 789 (9th Cir. 2012); State v. Immelt, 150 Wash. App. 681, 208 P.3d 1256 (Div. 1 2009), rev'd on other grounds, 173 Wash. 2d 1, 267 P.3d 305 (2011).

3 Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

4 Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984).

5 Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702 (7th Cir. 2003).

6 Eagon Through Eagon v. City of Elk City, Okl., 72 F.3d 1480 (10th Cir. 1996).

7 Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 188 Ed. Law Rep. 620 (11th Cir. 2004).

8 State v. Montas, 993 So. 2d 1127 (Fla. 5th DCA 2008); Dempsey v. Alston, 405 N.J. Super. 499, 966 A.2d 1, 242 Ed. Law Rep. 256 (App. Div. 2009); State v. Immelt, 150 Wash. App. 681, 208 P.3d 1256 (Div. 1 2009), rev'd on other grounds, 173 Wash. 2d 1, 267 P.3d 305 (2011).

9 Zalewska v. County of Sullivan, New York, 316 F.3d 314 (2d Cir. 2003).

10 State v. Chepilko, 405 N.J. Super. 446, 965 A.2d 190 (App. Div. 2009).

11 Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183 (3d Cir. 2008) (amplified speech, such as through the use of bullhorns, is protected expression); State v. Cook, 287 Conn. 237, 947 A.2d 307 (2008); Dempsey v. Alston, 405 N.J. Super. 499, 966 A.2d 1, 242 Ed. Law Rep. 256 (App. Div. 2009).

A prison did not violate a prisoner's First Amendment right of freedom of speech by preventing him from contacting his stockbroker to sell stock, even if the regulation or its implementation was arbitrary, since the order to sell was not the kind of verbal act that the First Amendment protected in that it had no connection to the marketplace of ideas and opinions, whether political, scientific, aesthetic, or even commercial. King v. Federal Bureau of Prisons, 415 F.3d 634 (7th Cir. 2005).

12 Dempsey v. Alston, 405 N.J. Super. 499, 966 A.2d 1, 242 Ed. Law Rep. 256 (App. Div. 2009).

13 Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 126 S. Ct. 1297, 164 L. Ed. 2d 156, 206 Ed. Law Rep. 819 (2006); Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); Kaahumanu v. Hawaii, 682 F.3d 789 (9th Cir. 2012); Corales v. Bennett, 567 F.3d 554, 244 Ed. Law Rep. 1045 (9th Cir. 2009); Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 188 Ed. Law Rep. 620 (11th Cir. 2004); Dempsey v. Alston, 405 N.J. Super. 499, 966 A.2d 1, 242 Ed. Law Rep. 256 (App. Div. 2009); State v. Aljutily, 149 Wash. App. 286, 202 P.3d 1004 (Div. 3 2009).

14 Virginia v. Black, 538 U.S. 343, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003); Wong v. Bush, 542 F.3d 732 (9th Cir. 2008); Roulette v. City of Seattle, 97 F.3d 300 (9th Cir. 1996), as amended on other grounds on denial of reh'g and reh'g en banc, (Sept. 17, 1996).

15 Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990) (overruled on other grounds by, Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010)); Philadelphia Fire Fighters' Union Local 22 v. City of Philadelphia, 286 F. Supp. 2d 476 (E.D. Pa. 2003) (the provisions of a city home rule charter and civil service regulations that prohibited uniformed fire department employees from making voluntary political contributions violated the rights of free speech and association protected under the First Amendment).

16 Spence v. State of Wash., 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974); Cline v. Rockingham County Superior Court, 502 F.2d 789 (1st Cir. 1974).

The display of the Confederate flag is not per se and patently offensive for First Amendment purposes. Bragg v. Swanson, 371 F. Supp. 2d 814, 199 Ed. Law Rep. 162 (S.D. W. Va. 2005).

17 Eagon Through Eagon v. City of Elk City, Okl., 72 F.3d 1480 (10th Cir. 1996); Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1997).

18 Jacobs v. Clark County School Dist., 373 F. Supp. 2d 1162, 199 Ed. Law Rep. 701 (D. Nev. 2005), aff'd, 526 F.3d 419, 232 Ed. Law Rep. 578 (9th Cir. 2008) (a student's choice of clothing may constitute "speech" protected by the First Amendment); City of Cincinnati v. Adams, 42 Ohio Misc. 48, 71 Ohio Op. 2d 455, 330 N.E.2d 463 (Mun. Ct. 1974) (a transvestite's mode of dress has been held not to be an expression within the contemplation of the First Amendment protecting freedom of speech); Martinez v. State, 323 S.W.3d 493 (Tex. Crim. App. 2010) (prohibition of gang clothing and hand signs).

19 King v. California Unemployment Ins. Appeals Bd., 25 Cal. App. 3d 199, 101 Cal. Rptr. 660 (1st Dist. 1972).

20 Anderson v. City of Hermosa Beach, 621 F.3d 1051, 67 A.L.R.6th 681 (9th Cir. 2010) (as with all collaborative creative processes, both the tattooist and the person receiving the tattoo are engaged in

expressive activity protected by the First Amendment); Coleman v. City of Mesa, 230 Ariz. 352, 284 P.3d 863 (2012).

21 Brown v. State of La., 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966) (involving a peaceful "sit-in" in a public library for the purpose of protesting the unconstitutional segregation of public facilities).

22 Junger v. Daley, 209 F.3d 481, 2000 FED App. 0117P (6th Cir. 2000).

23 Draper v. Logan County Public Library, 403 F. Supp. 2d 608 (W.D. Ky. 2005).

24 Mastrovincenzo v. City of New York, 435 F.3d 78 (2d Cir. 2006).

25 832 Corp. v. Gloucester Tp., 404 F. Supp. 2d 614 (D.N.J. 2005).

26 Roulette v. City of Seattle, 97 F.3d 300 (9th Cir. 1996), as amended on other grounds on denial of reh'g and reh'g en banc, (Sept. 17, 1996).

27 Church of American Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197 (2d Cir. 2004).

28 Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002).

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16A Am. Jur. 2d Constitutional Law § 529

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Constitutional Law
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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(7) Expressive Conduct or Symbolic or Nonverbal Speech

§ 529. Boycotts; pickets; protests and demonstrations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1845 to 1854, 1864, 1922

A.L.R. Library

Validity, Construction, and Operation of Statute or Regulation Forbidding, Regulating, or Limiting Peaceful Residential Picketing, 113 A.L.R.5th 1

Picketing or demonstrations carried on in a nonlabor context,[1] when free from coercion, intimidation, and violence,[2] are constitutionally guaranteed as free speech.[3] As a general matter, peaceful leafleting[4] or peaceful picketing[5] are expressive activities involving speech protected by the First Amendment.

The First Amendment forbids states to outlaw peaceful nontrespassory picketing, which does not deprive the people with whom the picketers are quarreling, or trying to influence, of their personal liberty or property rights; however, the First Amendment does not extend its protection to situations in which the picketer physically impedes entry to the picketed premises.[6] The conduct

aspects of picketing may be regulated by the state even when such conduct takes place upon public property.[7] A municipal ordinance prohibiting picketing before or about a residence or dwelling of any individual leaves open ample alternative channels of communication for the purpose of determining whether the ordinance violates the First Amendment.[8] A city ordinance prohibiting focused residential picketing in the street within 50 feet of a targeted dwelling but permitting such picketing on the sidewalk across the street from the dwelling is deemed narrowly tailored to serve a significant government interest in protecting residential privacy and tranquility, as required by the First Amendment free speech protections, although picketers who chose to take advantage of the exception could threaten the privacy and tranquility of residents living across the street from the target.[9] Similarly, a state's funeral picketing law advanced a significant governmental interest in protecting the peace and privacy of funeral attendees for a short time and in a limited space, for purpose of determining whether it was a legitimate time, place, and manner restriction under the First Amendment where a 500-foot buffer zone between mourners and protesters helped reduce significant emotional injuries vulnerable mourners could suffer due to the picketers' presence, provided added safety to protesters who could be subject to anger and violence from mourners, and provided necessary space to help ensure the safety of a large number of people within a city block.[10] On the other hand, an ordinance requiring picketers actually to move while holding their signs is unconstitutional under the First Amendment free speech principles, inasmuch as it is not narrowly tailored to the city's interest in the free flow of pedestrian traffic on public sidewalks, since requiring the picketers to remain in motion does not contribute to safe and convenient circulation on the sidewalks, and other sidewalk users, including the protestors distributing leaflets or carrying props, are not subject to the same requirement.[11]

A boycott intended to secure compliance by both civic and business leaders with demands for equality and racial justice and which is supported by speeches and nonviolent picketing, with the participants repeatedly encouraging others to join the cause, is a form of speech or conduct entitled to protection under the First and 14th Amendments.[12] City council resolutions endorsing the boycott of a newspaper company's newspapers during a labor dispute and directing city officials to cancel all official advertising in and subscriptions to the newspapers do not violate the First Amendment, where the resolutions are not motivated by views held by the company or the expression of those views; the city council members were merely responding to the company's treatment of its workers and what they generally perceived to be its callous corporate policies.[13] To the extent that protesters' blockade in opposition to the operation of a superferry to a harbor is conduct that does not constitute symbolic speech communicating the view that the superferry's operation is illegal, the protesters' blockade is not protected by the First Amendment.[14]

A statute prohibiting persons from knowingly approaching within eight feet of an individual who is within 100 feet of a health care facility entrance, for purposes of displaying a sign, engaging in oral protest, education, counseling, or passing leaflets or handbills, unless the individual has consented to that approach, does not impose an unconstitutional prior restraint on speech as it does not require the speaker to cease communication but only to remain eight feet away from the listener.[15]

While the surrounding circumstances must be considered, a city cannot threaten to prosecute protesters under a state disorderly conduct statute if the threats are nothing more than a pretext for stopping unpopular yet protected speech.[16]

Footnotes

1 As to whether picketing by labor organizations is an utterance protected by the guarantees of free speech and press, see Am. Jur. 2d, Labor and Labor Relations § 1733.

2 Carey v. Brown, 447 U.S. 455, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980).

3 Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972).

4 Childs v. Dekalb County, Ga., 286 Fed. Appx. 687 (11th Cir. 2008); People v. Mendelson, 24 Misc. 3d 307, 875 N.Y.S.2d 766 (Dist. Ct. 2009).

5 Childs v. Dekalb County, Ga., 286 Fed. Appx. 687 (11th Cir. 2008); Santer v. Board of Educ. of East Meadow Union Free School Dist., 23 N.Y.3d 251, 990 N.Y.S.2d 442, 13 N.E.3d 1028, 307 Ed. Law Rep. 369 (2014).

6 U.S. v. Soderna, 82 F.3d 1370 (7th Cir. 1996).

7 People v. Bush, 39 N.Y.2d 529, 384 N.Y.S.2d 733, 349 N.E.2d 832 (1976).

8 Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988).

9 Thorburn v. Austin, 231 F.3d 1114 (8th Cir. 2000).

10 Phelps-Roper v. Ricketts, 867 F.3d 883 (8th Cir. 2017).

11 Foti v. City of Menlo Park, 146 F.3d 629 (9th Cir. 1998), as amended on other grounds on denial of reh'g, (July 29, 1998).

12 N. A. A. C. P. v. Claiborne Hardware Co., 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982).

13 Alameda Newspapers, Inc. v. City of Oakland, 95 F.3d 1406 (9th Cir. 1996).

14 Wong v. Bush, 542 F.3d 732 (9th Cir. 2008).

15 Hill v. Colorado, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000).

16 Ovadal v. City of Madison, Wisconsin, 416 F.3d 531 (7th Cir. 2005).

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16A Am. Jur. 2d Constitutional Law § 530

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(7) Expressive Conduct or Symbolic or Nonverbal Speech

§ 530. Parades

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1762

A.L.R. Library

Validity, construction, and application of state or local enactments regulating parades, 80 A.L.R.5th 255

Public parading may constitute a method of expression entitled to First Amendment protection, but reasonable restrictions on the time, place, and manner are permissible when necessary to further significant governmental interests.[1] Indeed, in order to regulate the competing uses of public forums, the government may impose a permit requirement on those wishing to hold a march, parade, or rally, as long as the scheme does not delegate an overly broad licensing discretion to a government official and the limitations on the time, place, and manner of speech are not based on the content of the message, are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication.[2] For example, a city ordinance prohibiting Saturday morning parades is a reasonable time, place, and manner restriction on speech where the city establishes the fact of increased traffic at that time and proves that controlling such traffic is necessary to provide local citizens with access

to doctors' offices, drug stores, and other businesses.[3] However, a city ordinance making it an offense to parade without first obtaining a permit from the city commission, and authorizing the commission to refuse a permit if required by the "public welfare, peace, safety, health, decency, good order, morals, or convenience," was an unconstitutional censorship or prior restraint upon the enjoyment of First Amendment freedoms.[4] Moreover, a city's parade ordinance would be deemed a prior restraint on speech where it requires a permit before authorizing speech in the streets.[5]

Although raising revenue for police services is an important governmental responsibility of a county, it does not justify a county ordinance permitting a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order during the event; and an otherwise unconstitutional ordinance permitting a government administrator to vary the permit fee for assembling or parading to reflect the estimated cost of maintaining public order is not rendered constitutional by a $1,000 cap on the permit fee, since a tax or license fee based on the content of speech does not become more constitutional because it is a small tax.[6]

The organizers of a parade may not be required by the state to alter the expressive content of their parade; a state court's application of a state public accommodation law, prohibiting discrimination on the basis of, inter alia, sexual orientation, so as to require the private organizers of a St. Patrick's Day parade to permit a group of gay, lesbian, and bisexual descendants of Irish immigrants to participate as its own parade unit, carrying its own banner, violates the organizers' First Amendment free speech rights. Since every participating unit affected the message that the organizers conveyed, the state court order essentially required the organizers to alter the expressive content of their parade and has the effect of declaring the organizers' speech itself to be a public accommodation.[7] Parade organizers have a First Amendment right to exclude groups from their parade and not have the message of an opposing group forced on them by the state.[8] However, in First Amendment free speech context, there is a significant difference between participating in a parade, and standing on sidewalk and peacefully noting dissent as the parade goes by.[9] Although protest groups may not march in a privately organized parade against the organizer's wishes, the protest groups may gather and disseminate their message on sidewalks or at other points along the parade route, provided that they pose no public safety concern and do not interfere with the permitted area of the parade itself.[10]

Footnotes

1 State v. Frinks, 19 N.C. App. 271, 198 S.E.2d 570 (1973), decision aff'd, 284 N.C. 472, 201 S.E.2d 858 (1974).

2 Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101, 75 Ed. Law Rep. 29 (1992).

3 Douglas v. Brownell, 88 F.3d 1511 (8th Cir. 1996); Nationalist Movement v. City of Cumming, Ga., 92 F.3d 1135 (11th Cir. 1996).

4 Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 89 S. Ct. 935, 22 L. Ed. 2d 162 (1969).

5 Seattle Affiliate of October 22nd Coalition to Stop Police Brutality, Repression and Criminalization of a Generation v. City of Seattle, 430 F. Supp. 2d 1185 (W.D. Wash. 2006), rev'd on other grounds, 550 F.3d 788 (9th Cir. 2008).

6 Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 112 S. Ct. 2395, 120 L. Ed. 2d 101, 75 Ed. Law Rep. 29 (1992).

7 Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995).

8 Telescope Media Group v. Lucero, 936 F.3d 740 (8th Cir. 2019); South Boston Allied War Veterans Council v. City of Boston, 297 F. Supp. 2d 388 (D. Mass. 2003).

9 Deferio v. City of Syracuse, 306 F. Supp. 3d 492 (N.D. N.Y. 2018), appeal dismissed, (C.A.2 18-514)(June 18, 2018) and aff'd, 770 Fed. Appx. 587 (2d Cir. 2019).

The area along route of inaugural parade, including park space, was a quintessential public forum, for purposes of the First Amendment. A.N.S.W.E.R. Coalition (Act Now to Stop War and End Racism) v. Basham, 845 F.3d 1199 (D.C. Cir. 2017).

10 South Boston Allied War Veterans Council v. City of Boston, 297 F. Supp. 2d 388 (D. Mass. 2003).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(7) Expressive Conduct or Symbolic or Nonverbal Speech

§ 531. Cultural and artistic expression

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1576 to 1578, 1885, 1890 to 1895

Under the Constitution, aesthetic and moral judgments about art and literature are for individual to make, not for government to decree, even with the mandate or approval of the majority.[1] The expressive conduct protected by the First Amendment is not limited to conduct that communicates a political, social, philosophical, or religious message; the First Amendment protection also extends to artistic expression such as painting, music, poetry, and literature.[2] The First Amendment protects, as forms of expression and communication, art[3] and music.[4] A city's denial of a fashion company's application for a permit to hold a public art exhibition and demonstration at which artists would paint graffiti on the panels of mock subway cars, on the ground that the demonstration would "incite" others to paint graffiti on actual subway cars, violates the company's First Amendment right of free expression.[5] An essential First Amendment rule is that the artistic merit of a work does not depend on the presence of a single sexually explicit scene.[6]

Paintings, photographs, prints, and sculptures always communicate some idea or concept to those who view them and are entitled to full First Amendment protection.[7] Photography or videography that has a communicative or expressive purpose enjoys some First Amendment protection[8] as does the act of tattooing.[9]

Entertainment, no less than political and ideological speech, is also protected by the First Amendment and motion pictures, programs broadcast by radio and television, and live entertainment such as dramatic works all fall within the First Amendment guarantee.[10]

Footnotes

1 Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011).

2 State v. Chepilko, 405 N.J. Super. 446, 965 A.2d 190 (App. Div. 2009).

3 Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996).

4 Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989); State v. Catalano, 104 So. 3d 1069 (Fla. 2012) (right to play music, including amplified music, in public fora).

5 Ecko.Complex LLC v. Bloomberg, 382 F. Supp. 2d 627 (S.D. N.Y. 2005).

6 Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 152 L. Ed. 2d 403 (2002).

7 Mastrovincenzo v. City of New York, 435 F.3d 78 (2d Cir. 2006).

8 Gilles v. Davis, 427 F.3d 197 (3d Cir. 2005).

9 Jucha v. City of North Chicago, 63 F. Supp. 3d 820 (N.D. Ill. 2014).

10 Cardtoons, L.C. v. Major League Baseball Players Ass'n, 95 F.3d 959 (10th Cir. 1996).

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16A Am. Jur. 2d Constitutional Law § 532

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Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(7) Expressive Conduct or Symbolic or Nonverbal Speech

§ 532. Adult entertainment; nude or seminude dancing

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1890, 1896

A time, place, and manner regulation of adult entertainment will be upheld under the First Amendment if it is designed to serve a substantial government interest and reasonable alternative avenues of communication remain available; additionally, a time, place, and manner regulation must be justified without reference to the content of the regulated speech and narrowly tailored to serve the government's interest.[1]

The test for the constitutionality of a zoning ordinance having impact on the free speech rights of the proprietors and patrons of adult entertainment establishments is not whether the regulated establishments are defined without reference to content but whether the ordinance's goal is unrelated to suppressing that content.[2] A court determining the constitutionality of a zoning ordinance having an impact on the free speech rights of the proprietors and patrons of adult entertainment establishments may consider the results of studies conducted in other jurisdictions with respect to the impact of adult establishments on neighborhoods in which they are located.[3] For example, ordinances restricting adult entertainment establishments fulfill the legitimate governmental purpose of controlling the negative secondary effect of adult uses and do not have the impermissible goal of attempting to regulate the content of expression, despite the fact that the establishments regulated by the ordinances are defined according to the content of the expression promoted therein where the evidence supported the muncipality's conclusion that adult establishments have negative effects on the surrounding neighborhoods, and the goal of the amendments is unrelated to suppressing the content of expression.[4]

Entertainment in the form of nude dancing receives First Amendment protection.[5] Being "in a state of nudity" is not an inherently expressive condition, but erotic nude dancing is "expressive conduct" within the outer ambit of the First Amendment's protection.[6] Nude or seminude dancing is expressive conduct protected by the First Amendment; nevertheless, expressive conduct protected by the First Amendment may be regulated.[7]

Observation:

An ordinance banning nudity within sexually oriented businesses is not subject to strict scrutiny under the First Amendment as a "content-based" restriction on speech where the prohibition is on a form of conduct and applies to all "sexually oriented businesses," including establishments such as "adult motels" and "adult novelty stores," which are not engaged in expressive activity.[8]

Sexual intercourse engaged in for the purpose of creating commercial adult films is expressive conduct is "speech," and therefore any restriction on this expressive conduct requires First Amendment scrutiny.[9]

Government restrictions on public nudity should be evaluated under the framework set forth in *O'Brien*[10] for content-neutral restrictions on symbolic speech.[11] Under the *O'Brien* standard for evaluating restrictions on symbolic speech, the court inquires whether a government regulation is within the constitutional power of government to enact, whether the regulation furthers an important or substantial government interest, whether the government interest is unrelated to the suppression of free expression, and whether the restriction is no greater than is essential to furtherance of the government interest.[12] For example, an ordinance proscribing nudity in public places satisfies the standard for restrictions on symbolic speech, since the city's efforts to protect public health and safety are clearly within its police powers, the ordinance furthered the city's interest in combating harmful secondary effects associated with nude dancing, the government's interest is unrelated to the suppression of free expression, and the incidental impact on the expressive element of nude dancing is de minimis.[13] Likewise, a city's nudity ban and its accompanying requirement that dancers wear "G-strings" and "pasties" presents a restriction on the First Amendment rights of the dancers and the adult entertainment establishment that is no greater than is necessary to further the city's stated interest in decreasing the likelihood of unsanitary conditions, unlawful sexual activity, and sexually transmitted diseases.[14]

Observation:

Because nude dancing at an establishment is of the same character as adult entertainment at issue in prior Supreme Court opinions, it is reasonable for a city to conclude that such nude dancing is likely to produce the same secondary effects, and, to justify an ordinance regulating nude dancing, a city can reasonably rely on the evidentiary foundation set forth in Supreme Court opinions to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood, and the city is not required to develop a specific evidentiary record supporting an ordinance.[15]

A public indecency ordinance, prohibiting public nudity, violates the nude dancing establishment's First Amendment right to free expression where the town does not show that it furthers the substantial governmental interest of preventing the negative secondary effects of nude adult entertainment, absent evidence that at the time of the ordinance's enactment, the town select board relied on evidence of negative secondary effects.[16]

An outcall dancer's nude dancing performances constituted expression protected by the First Amendment, notwithstanding the city's contention that due to the private setting in which the dancer's performances occurred, his services were of an escort nature and outside the First Amendment's protection.[17]

Town ordinances barring establishments from selling alcoholic beverages if a dancer performing on the premises exposed any "specified anatomical area," and also requiring that such dancer perform on a stage at least 18 inches above and five feet away from the patrons, do not regulate activity protected under the First Amendment.[18]

A court could not uphold obscenity laws that, by their plain terms, unconstitutionally reached substantial amount of constitutionally protected expressive activity merely because the state represented that it would not enforce the statute in a manner that violated First Amendment rights.[19]

Footnotes

1 Ben's Bar, Inc. v. Village of Somerset, 316 F.3d 702 (7th Cir. 2003); Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County, Maryland, 256 F. Supp. 2d 385 (D. Md. 2003).
As to time, place, and manner restrictions, generally, see §§ 534, 535.

2 Stringfellow's of New York, Ltd. v. City of New York, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407 (1998).

3 Stringfellow's of New York, Ltd. v. City of New York, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407 (1998).

4 American Entertainers, L.L.C. v. City of Rocky Mount, North Carolina, 888 F.3d 707 (4th Cir. 2018) (city ordinance requiring sexually oriented businesses to obtain a license, and pay a licensing fee, prior to operation materially advanced city's substantial interest in regulating the deleterious secondary effects flowing from such businesses, as required for ordinance to satisfy intermediate scrutiny under First Amendment); State v. Russo, 328 N.J. Super. 181, 745 A.2d 540 (App. Div. 2000); Stringfellow's of New York, Ltd. v. City of New York, 91 N.Y.2d 382, 671 N.Y.S.2d 406, 694 N.E.2d 407 (1998); Foster v. City of El Paso, 396 S.W.3d 244 (Tex. App. El Paso 2013).

5 Willis v. Town of Marshall, 293 F. Supp. 2d 608 (W.D. N.C. 2003).

6 City of Erie v. Pap's A.M., 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000); G.M. Enterprises, Inc. v. Town of St. Joseph, Wis., 350 F.3d 631, 62 Fed. R. Evid. Serv. 1656 (7th Cir. 2003).

7 McCrothers Corp. v. City of Mandan, 2007 ND 28, 728 N.W.2d 124 (N.D. 2007).

8 Heideman v. South Salt Lake City, 348 F.3d 1182 (10th Cir. 2003).

9 Vivid Entertainment, LLC v. Fielding, 965 F. Supp. 2d 1113 (C.D. Cal. 2013), aff'd, 774 F.3d 566 (9th Cir. 2014).

10 U. S. v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

11 City of Erie v. Pap's A.M., 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000); Heideman v. South Salt Lake City, 348 F.3d 1182 (10th Cir. 2003).

12 City of Erie v. Pap's A.M., 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000).

13 City of Erie v. Pap's A.M., 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000); Sammy's of Mobile, Ltd. v. City of Mobile, 140 F.3d 993 (11th Cir. 1998).

14 Heideman v. South Salt Lake City, 165 Fed. Appx. 627 (10th Cir. 2006).

15 City of Erie v. Pap's A.M., 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000).

16 White River Amusement Pub, Inc. v. Town of Hartford, Vt., 412 F. Supp. 2d 416 (D. Vt. 2005), decision aff'd, 481 F.3d 163 (2d Cir. 2007).

17 Currence v. City of Cincinnati, 28 Fed. Appx. 438 (6th Cir. 2002).

18 G.M. Enterprises, Inc. v. Town of St. Joseph, Wis., 350 F.3d 631, 62 Fed. R. Evid. Serv. 1656 (7th Cir. 2003).

19 Powell's Books, Inc. v. Kroger, 622 F.3d 1202 (9th Cir. 2010).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(7) Expressive Conduct or Symbolic or Nonverbal Speech

§ 533. Physical assaults, violence, and criminal acts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1558

Specific criminal acts are not protected speech under the First Amendment even if speech is the means for their commission.[1] Speech integral to criminal conduct is not protected.[2] A physical assault is not expressive conduct protected by the First Amendment, even though the person committing the assault intends to thereby express an idea.[3] Violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact are entitled to no constitutional protection.[4] While the right to peaceful protest lies near the heart of freedom of speech, the use of force or violence is outside scope of First Amendment protection, as is incitement of violent or lawless action.[5]

Observation:

A conviction may be based on an individual's conduct even if he or she engaged in protected speech; freedom of speech does not immunize speech used as an integral part of conduct in violation of a valid criminal statute.[6]

CUMULATIVE SUPPLEMENT

Cases:

When violence occurs during activity protected by the First Amendment, that provision mandates precision of regulation with respect to the grounds that may give rise to damages liability as well as the persons who may be held accountable for those damages. U.S. Const. Amend. 1. McKesson v. Doe, 141 S. Ct. 48 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Packingham v. North Carolina, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017).

2 State v. Mitchell, 343 S.W.3d 381 (Tenn. 2011).

3 U.S. v. Soderna, 82 F.3d 1370 (7th Cir. 1996); Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996).

4 Wisconsin v. Mitchell, 508 U.S. 476, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993); State v. Meeds, 244 Ariz. 454, 421 P.3d 653 (Ct. App. Div. 1 2018), review denied, (Apr. 5, 2019).

5 United States v. Daley, 378 F. Supp. 3d 539 (W.D. Va. 2019).

6 State v. E.J.J., 183 Wash. 2d 497, 354 P.3d 815 (2015).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(8) Time, Place, and Manner Restrictions

§ 534. Time, place, and manner regulations as not violating First Amendment, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1508 to 1510

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.[1] However, laws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether.[2] The First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.[3] Even speech that is protected under the First Amendment is not equally permissible in all places and at all times, and it may be subject to reasonable time, place, or manner restrictions.[4] The First and 14th Amendments do not give absolute protection to every individual to speak whenever or wherever he or she pleases or to use any form of address in any circumstances that he or she chooses.[5] People who desire to propagandize or protest have no right under the First Amendment to do so whenever, however, and wherever they please,[6] since freedom of speech, while fundamental in our democratic society, does not comprehend the right to speak on any subject at any place and at any time.[7] Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, and manner restrictions.[8]

Accordingly, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided that the restrictions are content-neutral, that they are narrowly tailored to serve a significant governmental interest, and that they

leave open ample alternative channels for communication of the information.[9] Likewise, the right to freedom of the press, as with other First Amendment rights, is subject to reasonable time, place, and manner restrictions.[10]

To be valid under the First Amendment free speech provisions, a time, place, and manner restriction also must not delegate overly broad discretion to a government official.[11] In analyzing a First Amendment free speech claim, a regulation cannot be a content-neutral time, place, or manner restriction if either the underlying purpose of the regulation is to suppress particular ideas, or if the regulation, by its very terms, singles out particular content for differential treatment.[12] A time, place, and manner regulation on First Amendment speech must contain adequate standards to guide the official's decision and render it subject to effective judicial review.[13] "Narrow tailoring" in the context of time, place, and manner regulations of protected speech means that the government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals, but it does not require that the means chosen be the least restrictive or least intrusive means of serving its goals.[14] The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.[15] When the government could adopt a narrower regulation of the time, place, or manner of protected speech that would significantly reduce the negative impact on speech without substantially interfering with its legislative goals, the government should be forced to adopt the narrower regulation.[16]

Reducing crime is a substantial government interest, for the purpose of justifying a time, place, and manner regulation of speech;[17] however, a mere speculation of harm does not constitute a compelling state interest justifying a limitation on the exercise of the right to free speech.[18]

Under the First Amendment, a valid time, place, and manner restriction must allow for alternative channels of communication, but the government may not abridge a citizen's right to exercise liberty of expression in an appropriate place simply because that same expression may be exercised in another place.[19] An alternative for communication is not ample if the speaker is not permitted to reach the intended audience.[20]

The nature of a place and the pattern of its normal activities dictate the kinds of regulations of the time, place, and manner of expressive conduct that are reasonable; the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time, weighing heavily the fact that communication is involved and that the regulation must be narrowly tailored to further the state's legitimate interest.[21]

Consistent with the foregoing principles, the courts have held that—

— a municipal park ordinance requiring individuals to obtain a permit before conducting more-than-50-person events does not have to contain procedural safeguards applicable to content-based regulations in order to be consistent with the First Amendment, since the ordinance was a content-neutral time, place, and manner regulation of the use of a public forum.[22]

— police actions, in requesting that religious counterprotestors at a gay pride event move away from the stage and vendors and in arresting the counterprotestors for failing to do so, are content-neutral time, place, and manner restrictions on the counterprotestors' conduct, where the counterprotestors used bullhorns and microphones in an attempt to drown out the platform speakers, congregated in the middle of the walkway, directly confronted a transgendered individual, and blocked access to the vendors who had applied for booths at the event.[23]

— the grandfather provision of a city's zoning ordinance, which allowed nonconforming signs erected pursuant to a permit to remain after the zoning change banning advertising signs within 250 feet of a residential district, is a content-neutral time,

place, and manner restriction on speech rather than a regulation of commercial speech and therefore is not required to advance a substantial government interest, as the grandfather provision applied to all manner of signs, not just advertising signs.[24]

— election laws that prohibited all expressive activity within 100 feet of a polling place on election day were content-neutral and narrowly tailored so as to not violate free speech rights under the First Amendment; laws did not suppress expressive speech, but rather were reasonable time, place, and manner restrictions that accommodated competing constitutional rights, the right to vote and the rights of freedom of speech and of the press.[25]

— an ordinance establishing a curfew in a public park is constitutional under the First Amendment right to free speech if it is content neutral, is narrowly tailored to advance a significant government interest, and allows alternative channels of speech.[26]

— a provision of a township ordinance prohibiting adult cabarets that did not serve alcohol from being open between midnight and noon is a reasonable time, place and manner restriction, and comports with the First Amendment, where the ordinance furthered the township's interest in combating harmful secondary effects associated with sexually oriented businesses, while allowing nonalcoholic cabarets to remain open 72 hours per week, and the First Amendment does not require that the township choose to allow alcohol-free cabarets to close at a later time in an effort to prevent disparate treatment of alcohol-licensed adult cabarets which are permitted to remain open later under the state's liquor laws.[27]

— state bar admission requirements constitute reasonable time, place, and manner restrictions on the First Amendment right to consult with an attorney, where the requirements are content neutral, narrowly tailored to achieving a substantial governmental interest, and left open ample alternative channels through which the state residents can obtain legal representation.[28]

— forbidding the advocacy of jury nullification in a courthouse lobby is a reasonable regulation of the time, place, and manner of speech consistent with the First Amendment.[29]

— an ordinance confining adult entertainment businesses to specified zones satisfies the requirement for a time, place, and manner restriction on First Amendment protected speech, that alternative avenues be left open for the communication of speech, where there were seven sites within the designated zones and fewer than seven adult businesses that would be forced to relocate.[30]

— a city sign ordinance is a constitutional time, place, and manner regulation of speech under both the First Amendment and the state constitution where the signs are regulated under the city's police power; the city's stated goals of the ordinance, that is, public safety, traffic safety, health, welfare, and aesthetics, constitute a substantial government interest, which is unrelated to the suppression of free speech; and the ordinance suppressed no more speech than necessary to achieve the city's goals.[31]

On the other hand, a police department's decision to allow a peace organization to march at the end of a St. Patrick's Day parade, without a permit and against the wishes of veterans groups that organized the parade, does not qualify as a legitimate time, place, and manner restriction on the organizers' speech but rather serves as a content-based restriction on the organizers' expression.[32]

Practice Tip:

In First Amendment cases, a plaintiff need not be subject to a speech restriction in order to have standing to advance a challenge, as protections extend to both the speakers and the listeners, the latter having a right to receive information and ideas.[33] However, absent proof of concrete harm, where the First Amendment plaintiff only alleges inhibition of speech, no standing exists.[34]

Footnotes

1 Packingham v. North Carolina, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017).

2 E & J Equities, LLC v. Board of Adjustment of the Township of Franklin, 226 N.J. 549, 146 A.3d 623 (2016).

3 Wood v. Moss, 572 U.S. 744, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014); M.A.L. ex rel. M.L. v. Kinsland, 543 F.3d 841, 237 Ed. Law Rep. 587 (6th Cir. 2008); Crosby v. South Orange County Community College Dist., 172 Cal. App. 4th 433, 91 Cal. Rptr. 3d 161, 242 Ed. Law Rep. 851 (4th Dist. 2009), as modified on other grounds on denial of reh'g, (Mar. 19, 2009).

4 Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); Del Gallo v. Parent, 557 F.3d 58 (1st Cir. 2009).

5 People v. Mendelson, 24 Misc. 3d 307, 875 N.Y.S.2d 766 (Dist. Ct. 2009).

6 Greer v. Spock, 424 U.S. 828, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976).

7 Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974).

8 Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984).

9 McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014); McTernan v. City of York, PA, 564 F.3d 636 (3d Cir. 2009); International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles, 764 F.3d 1044 (9th Cir. 2014); Telemundo of Los Angeles v. City of Los Angeles, 283 F. Supp. 2d 1095 (C.D. Cal. 2003).

10 In re Attorney General's "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups," issued July 18, 2007, 200 N.J. 283, 981 A.2d 64 (2009).

11 Seattle Affiliate of Oct. 22nd Coalition to Stop Police Brutality, Repression and Criminalization of a Generation v. City of Seattle, 550 F.3d 788 (9th Cir. 2008).

12 Browne v. City of Grand Junction, Colorado, 27 F. Supp. 3d 1161 (D. Colo. 2014).

13 Occupy Columbia v. Haley, 738 F.3d 107 (4th Cir. 2013).

14 Richland Bookmart, Inc. v. Knox County, Tenn., 555 F.3d 512 (6th Cir. 2009).

15 Doe I v. Landry, 909 F.3d 99 (5th Cir. 2018); Real v. City of Long Beach, 852 F.3d 929 (9th Cir. 2017); State v. Bailey, 166 N.H. 537, 100 A.3d 514 (2014).

16 Doe I v. Landry, 909 F.3d 99 (5th Cir. 2018).

17 City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002).

18 Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York, 447 U.S. 530, 100 S. Ct. 2326, 65 L. Ed. 2d 319 (1980).

19 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975); Bischoff v. Florida, 242 F. Supp. 2d 1226 (M.D. Fla. 2003).

20 Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183 (3d Cir. 2008).

21 Globe Newspaper Co. v. Beacon Hill Architectural Com'n, 100 F.3d 175 (1st Cir. 1996); Eagon Through Eagon v. City of Elk City, Okl., 72 F.3d 1480 (10th Cir. 1996).

22 Thomas v. Chicago Park Dist., 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002).

23 Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183 (3d Cir. 2008).

24 General Auto Service Station v. City of Chicago, 526 F.3d 991 (7th Cir. 2008).

25 In re Attorney General's "Directive on Exit Polling: Media and Non-Partisan Public Interest Groups," issued July 18, 2007, 200 N.J. 283, 981 A.2d 64 (2009).

26 Cleveland v. McCardle, 139 Ohio St. 3d 414, 2014-Ohio-2140, 12 N.E.3d 1169 (2014).

27 Deja Vu of Cincinnati, L.L.C. v. Union Tp. Bd. of Trustees, 411 F.3d 777, 2005 FED App. 0270P (6th Cir. 2005).

28 Mothershed v. Justices of Supreme Court, 410 F.3d 602 (9th Cir. 2005), as amended on denial of reh'g, (July 21, 2005) and opinion amended on other grounds on denial of reh'g, 2005 WL 1692466 (9th Cir. 2005).

29 Braun v. Baldwin, 346 F.3d 761 (7th Cir. 2003).

30 Bigg Wolf Discount Video Movie Sales, Inc. v. Montgomery County, Maryland, 256 F. Supp. 2d 385 (D. Md. 2003).

31 Lamar Advertising Co. v. City of Douglasville, Georgia, 254 F. Supp. 2d 1321 (N.D. Ga. 2003).

32 South Boston Allied War Veterans Council v. City of Boston, 297 F. Supp. 2d 388 (D. Mass. 2003) (the action was not content-neutral in that it altered the organizers' speech).

33 Kansas Judicial Review v. Stout, 519 F.3d 1107 (10th Cir. 2008), certified question answered on other grounds, 287 Kan. 450, 196 P.3d 1162 (2008), opinion after certified question answered on other grounds, 562 F.3d 1240 (10th Cir. 2009).

34 Morrison v. Board of Educ. of Boyd County, 521 F.3d 602, 231 Ed. Law Rep. 527 (6th Cir. 2008).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(8) Time, Place, and Manner Restrictions

§ 535. Time restrictions on utterance

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1508 to 1510

The time of an utterance is particularly important in the case of radio or television broadcasting, inasmuch as the government has a compelling interest in protecting children from the effects of broadcasting patently offensive materials.[1] The Supreme Court has upheld a federal statute allowing cable system operators to prohibit "programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Whether a televised program is "patently offensive" may depend on the context, degree, and time of the broadcast.[2]

A statute limiting the hours and days that adult entertainment establishments can be open does not violate the First Amendment, as reducing crime, open sex, and solicitation of sex and preserving the aesthetic and commercial character of the neighborhoods surrounding adult establishments is a "substantial government interest," the statute is a reasonable means of furthering that interest, and the statute left open alternative avenues of communication.[3]

Footnotes

1 Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996).

2 Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C., 518 U.S. 727, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996).

3 Richland Bookmart, Inc. v. Nichols, 137 F.3d 435, 1998 FED App. 0070P (6th Cir. 1998).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(9) Media Restrictions

§ 536. Media of expression, generally; print media

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1508 to 1510

The freedom of speech and of the press are fundamental personal rights not limited to particular media of expression.[1] Since the press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion,[2] the liberty of the press is not confined to newspapers and periodicals; it necessarily embraces handbills and literature,[3] such as pamphlets and leaflets.[4]

The First Amendment will bar a celebrity tennis player's false endorsement claim against an adult entertainment magazine, which had published partially nude photographs of a woman incorrectly identified as the player, absent a showing of actual malice, where there is no evidence that the publisher intentionally designed the magazine in a way that is likely to confuse the average reader into believing that the player endorsed or is in any way associated with the magazine.[5]

A city and county ordinance requiring all publishers wishing to distribute their publications along the sidewalks in a special tourism district to use one of the two sets of government-provided news racks, one set being coin-operated and one set being noncoin-operated for free publications, leaves open ample alternative channels of communication, as required to be a time, place, or manner speech restriction, where the free publications still have the opportunity to distribute their publications by way of the noncoin-operated racks, as well as other distribution mechanisms inside and outside of the special district.[6]

Footnotes

1 Mortgage Specialists, Inc. v. Implode-Explode Heavy Industries, Inc., 160 N.H. 227, 999 A.2d 184 (2010); Brown v. Kingsley Books, Inc., 1 N.Y.2d 177, 151 N.Y.S.2d 639, 134 N.E.2d 461 (1956), judgment aff'd, 354 U.S. 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469 (1957) (freedom of speech and of the press extends to all media of expression).

2 Kaplan v. California, 413 U.S. 115, 93 S. Ct. 2680, 37 L. Ed. 2d 492 (1973); Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972).

3 City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993); International Caucus of Labor Committees v. City of Montgomery, 111 F.3d 1548 (11th Cir. 1997).
Generally, as to advertising by circulars, handbills, and the like, as within the protection of free speech or press, see Am. Jur. 2d, Advertising § 21.

4 Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646, 33 L. Ed. 2d 626 (1972); Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S. Ct. 1575, 29 L. Ed. 2d 1 (1971).

5 Kournikova v. General Media Communications Inc., 278 F. Supp. 2d 1111 (C.D. Cal. 2003).

6 Honolulu Weekly, Inc. v. Harris, 298 F.3d 1037 (9th Cir. 2002).

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Constitutional Law

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(9) Media Restrictions

§ 537. Broadcast media; Internet

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1508 to 1510, 1643, 1644, 2125 to 2154

A.L.R. Library

First Amendment Protection Afforded to Web Site Operators, 30 A.L.R.6th 299

Construction and application of Public Broadcasting Act of 1967 as amended (47 U.S.C.A. secs. 396 et seq.) with respect to controlling content of public television programs, 44 A.L.R. Fed. 350

The First Amendment protects the free speech and press rights of the broadcast media, including radio and television,[1] which includes television cable programmers and cable operators,[2] and the Internet.[3]

Observation:

The fundamental technological differences between broadcast and cable television transmission renders the relaxed standard of scrutiny for broadcast regulation inapplicable to a First Amendment challenge of cable regulation, since cable television does not suffer from the inherent limitations of broadcast television arising from the scarcity of available broadcast frequencies compared to the number of would-be broadcasters.[4]

The requirement of the Communications Act of 1934 that a radio station must not be operated without a license from the Federal Communications Commission (FCC) does not violate the First Amendment free speech rights of the owner and operator of the unlicensed radio station.[5] Where a radio station owner never applied for a broadcast license, neither it nor its president nor its listeners have any First Amendment free speech interest in its broadcasts, and the station lacks a plausible claim to the presumption of irreparable harm, on its motion for a preliminary injunction against the civil in rem forfeiture of its equipment.[6]

Footnotes

1 Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997).

2 Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994); Jones Intercable of San Diego, Inc. v. City of Chula Vista, 80 F.3d 320 (9th Cir. 1996).

3 Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997); Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 49 Fed. R. Serv. 3d 404, 120 A.L.R.5th 725 (W.D. Wash. 2001) (the First Amendment protections extend to speech via the Internet).

4 Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994).

5 U.S. v. Ganley, 300 F. Supp. 2d 200 (D. Me. 2004).

6 U.S. v. Any and All Radio Station Transmission Equipment, 204 F.3d 658, 2000 FED App. 0069P (6th Cir. 2000).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(9) Media Restrictions

§ 538. Telemarketing and robocalls

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1508 to 1510

A.L.R. Library

Propriety of Class Actions Under Telephone Consumer Protection Act, 47 U.S.C.A. s227, 30 A.L.R. Fed. 2d 537

Limits may be placed on certain forms of telemarketing that reach homes and places of business.[1] For example, a state statute regulating telephone automatic dialing and announcing devices (ADAD) for all purposes, subject to certain exemptions, is a permissible time, place, and manner restriction on speech, since the prohibitory provision prescribes a method of communications, not its content, the exemptions do not improperly privilege some relationships over others, the state has a significant interest in protecting the public from voluminous ADAD calls which threaten residential privacy and disrupt workplaces, a no less restrictive means of accomplishing these governmental objectives is readily apparent, and such a statute leaves ample channels free to the public otherwise to disseminate messages.[2] Autocalls and robocall systems have been

considered a private channel of communication designed to reach private residences which may be enjoined by statute so long as the law is content neutral.[3]

Footnotes

1 Bland v. Fessler, 88 F.3d 729 (9th Cir. 1996).

2 Bland v. Fessler, 88 F.3d 729 (9th Cir. 1996).

3 State v. Economic Freedom Fund, 959 N.E.2d 794 (Ind. 2011).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(9) Media Restrictions

§ 539. Other media

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1508 to 1510, 1675 to 1678, 1892

The First Amendment protects free speech and press rights in connection with messages that appear on billboards[1] and in motion pictures[2] and that are spoken or transmitted over the telephone[3] or that are sent through the mail.[4]

Video games qualify for First Amendment protection.[5] The provision of a state law requiring that video games which meet the statute's definition of "violent" have to be labeled on the front of the package, with a white "18" outlined in black and at least two inches square does not violate the First Amendment merely because it conflicts with the video game industry's voluntary ratings system.[6] Also, a state statute criminalizing "computer-generated reproduction" of child pornography does not violate the First Amendment free speech guarantee where it criminalizes the reproduction not of sexually explicit images of "virtual" or nonexistent children but rather of sexually explicit images of real children, whether reproduced by a computer or other means.[7]

Footnotes

1 Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed. 2d 800 (1981); Desert Outdoor Advertising, Inc. v. City of Moreno Valley, 103 F.3d 814 (9th Cir. 1996).

2 As to motion pictures as within the ambit of the constitutional protection of free speech and press, see Am. Jur. 2d, Entertainment and Sports Law §§ 31 to 33.

3 Sokol v. Public Utilities Commission, 65 Cal. 2d 247, 53 Cal. Rptr. 673, 418 P.2d 265 (1966).

4 Am. Jur. 2d, Postal Service § 39.

5 Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011), further providing that while states no doubt possess legitimate power to protect children from harm, that power does not include a free-floating power to restrict ideas to which children may be exposed.

6 Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005).

7 Slavek v. Hinkle, 359 F. Supp. 2d 473 (E.D. Va. 2005).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(10) Place Restrictions

§ 540. Place restrictions on free speech and press, generally; public forums

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1509, 1510, 1731 to 1739

While the government's ability to prohibit expressive activity in public forums is limited,[1] the First Amendment right to free speech does not guarantee access to property simply because it is owned or controlled by the government; rather, the existence of a right of access to public property, and the standard by which limitations upon such a right must be evaluated, differ depending on the character of the property at issue.[2] In assessing whether an individual's rights have been violated under the First Amendment, it must first be determined which type of public forum the regulation in question seeks to direct, as the forum classification determines the appropriate standard to be applied.[3] Four types of forums may exist, for free speech purposes, on government property (1) traditional public forums, (2) designated public forums, (3) limited public forums, and (4) nonpublic forums.[4] Viewpoint discrimination is prohibited, on First Amendment grounds, in all public fora, both in traditional public fora and in limited or designated public fora.[5]

Observation:

On a First Amendment free speech challenge, the perimeters of the relevant forum are determined by the type of access sought by the speaker.[6]

Public forums enjoy a special position in terms of First Amendment protection because of the critical role they play in fostering public debate, expression, and assembly;[7] governmental entities are strictly limited by the First Amendment in their ability to regulate private speech in public fora.[8] The guiding First Amendment principle that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content applies with full force in a traditional public forum.[9] Indeed, the First Amendment's protection of public speech applies with greatest force in a traditional public forum.[10] Where government property has by law or tradition been given the status of a public forum, the state's right to limit protected expressive activity thereon is sharply circumscribed.[11] In a traditional public forum, the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited.[12] Furthermore, in a traditional public forum, content-based restrictions on speech are valid only if necessary to serve a compelling state interest and only if they are narrowly drawn to achieve that end.[13] As a general rule, in a traditional public forum the government may not selectively shield the public from some kinds of speech on the ground that they are more offensive than others.[14] Moreover, government officials may not, under the First Amendment, exclude from public places persons engaged in peaceful expressive activity solely because the government actor fears, dislikes, or disagrees with the views those persons express.[15] Although the government's intent may be a factor to be considered regarding a public forum in a free speech action, it is only one factor, and it is not dispositive.[16]

"Traditional public forums," for purposes of the First Amendment free speech protections, are those places which by long tradition or by government fiat have been devoted to assembly and debate,[17] such as streets and parks.[18] The mere fact that a sidewalk abuts property dedicated to purposes other than free speech is not enough to strip it of public forum status under the First Amendment.[19] However, a sidewalk leading from the parking area of a post office to the front door is not a traditional public forum, nor has the Postal Service expressly dedicated the sidewalk to any expressive activity; thus, a regulation prohibiting solicitation on postal premises only has to be reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.[20] The lobby of a courthouse is not a traditional public forum for First Amendment purposes, since a lobby is not a place open to the public for the presentation of views.[21] Likewise, a city's Internet Web home page, and requested hypertext link from the city home page to the Internet Web page maintained by a publisher seeking to expose government corruption in the city, did not allow open communication or the free exchange of ideas between members of the public and thus does not constitute a "traditional public forum," for purposes of a claim that the city's refusal to establish a hypertext link violates the publisher's First Amendment free speech rights.[22]

Observation:

In some instances, the inability to exclude another speaker from a particular public forum at a particular time may impair a speaker's ability to engage in protected speech.[23]

Content-based statutory restrictions on speech in public forums are strictly scrutinized,[24] and none is permitted by the First Amendment except as necessary to serve a compelling state interest and when narrowly drawn to achieve that end.[25] However, when the forum is public and the statutory restriction is content-neutral, the First Amendment requires a lesser or "intermediate" scrutiny and permits regulation of the time, place, and manner of expression that is narrowly tailored to serve a significant governmental interest and that leaves open ample alternative channels of communication.[26] Simply stated, reasonable, content-neutral time, place, or manner restrictions are permissible in a public forum.[27] The government thus may enforce reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve significant governmental interests, and leave open ample alternative channels of communication. Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest.[28] When the government seeks to regulate that which restricts content-neutral expressive activity in a public forum, the First Amendment requires that the regulation satisfy requirements as to time, place, and manner of restriction.[29] Similarly, a city may impose reasonable restrictions on the time, place, and manner of protected speech in a public forum as long as the restrictions are content-neutral; are narrowly tailored to serve a significant governmental interest; and they leave open ample alternative channels for communication of the information.[30] In the absence of a showing that the steps of a city hall have been traditionally restricted, the steps are deemed a traditional public forum, and expression there cannot be banned absolutely but only subjected to reasonable, content-neutral, time, place, and manner regulations.[31]

The government does not create a public forum to which First Amendment speech protections apply by inaction or by permitting limited discourse,[32] or whenever members of the public are permitted to freely visit a place owned or operated by the government;[33] rather, the decision to create a public forum must instead be made by intentionally opening a nontraditional forum for public discourse.[34]

Observation:

Because facilities or locations deemed to be public forums are usually operated by governments, determining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to limitations under the free speech clause.[35]

Although a traditional public forum occupies a special position in terms of First Amendment protection, property covered by an ordinance prohibiting the posting of signs on certain public property, including any sidewalk, crosswalk, curb, curbstone, street lamppost, hydrant, tree, shrub, or certain other public property, are not "public fora" subject to special First Amendment protection.[36] On the other hand, public schools may take on the characteristics of public fora, for the purpose of free speech analysis, by intentionally opening their facilities for public discourse.[37]

Although public broadcasting as a general matter does not lend itself to First Amendment scrutiny under the forum doctrine, debates among candidates for political office present the narrow exception to the rule.[38]

The First Amendment public forum principles, which require strict scrutiny of an alleged restriction on speech, do not apply to the analysis of the First Amendment validity of the Children's Internet Protection Act, under which a public library cannot receive federal assistance to provide internet access, unless it installs software both to block images that constitute obscenity or child pornography and to prevent minors from obtaining access to material that is harmful to them, since internet access in public libraries is neither a traditional nor a designated public forum.[39]

A public university student activities fund is not a "public forum" in the traditional sense of the term, but public forum cases are instructive with respect to safeguards as to the expressive activities which objecting students are required to support.[40]

Observation:

The government may not close a traditional public forum to expressive activity altogether.[41]

Footnotes

1 City of New Orleans v. Clark, 251 So. 3d 1047 (La. 2018).
Because the government must respect the open character of a public forum, its ability under the First Amendment to restrict expressive activity in such an area is very limited. Pulphus v. Ayers, 249 F. Supp. 3d 238 (D.D.C. 2017), appeal dismissed as moot, 909 F.3d 1148 (D.C. Cir. 2018).

2 San Antonio Firefighters' Association, Local 624 v. City of San Antonio, 404 F. Supp. 3d 1045 (W.D. Tex. 2019).

3 Ortega v. Recreation and Parks Commission for Parish of East Baton Rouge, 255 So. 3d 6 (La. Ct. App. 1st Cir. 2018).

4 Brindley v. City of Memphis, Tennessee, 934 F.3d 461 (6th Cir. 2019); Amalgamated Transit Union Local 1015 v. Spokane Transit Authority, 929 F.3d 643 (9th Cir. 2019); Cole v. Goossen, 402 F. Supp. 3d 992 (D. Kan. 2019); Campbell v. Reisch, 367 F. Supp. 3d 987 (W.D. Mo. 2019); Hansen v. Town of Smithtown, 342 F. Supp. 3d 275 (E.D. N.Y. 2018); San Antonio Firefighters' Association, Local 624 v. City of San Antonio, 404 F. Supp. 3d 1045 (W.D. Tex. 2019).
Public property which is not by tradition or designation a forum for public communication is governed by different standards with respect to a free speech claim. Silberberg v. Board of Elections of New York, 272 F. Supp. 3d 454 (S.D. N.Y. 2017).
As to designated public forums, see § 541.
As to limited public forums, see § 542.
As to nonpublic forums, see § 543.

5 Davison v. Randall, 912 F.3d 666 (4th Cir. 2019), as amended on other grounds, (Jan. 9, 2019).

6 San Antonio Firefighters' Association, Local 624 v. City of San Antonio, 404 F. Supp. 3d 1045 (W.D. Tex. 2019).

Generally, when a free speech challenge arises in regard to activity on property owned and controlled by the government, a court will engage in a "forum analysis" to determine the level of judicial scrutiny that applies. Bradburn v. North Cent. Regional Library Dist., 168 Wash. 2d 789, 231 P.3d 166 (2010).

7 Champion v. Commonwealth, 520 S.W.3d 331 (Ky. 2017).

8 Davison v. Randall, 912 F.3d 666 (4th Cir. 2019), as amended on other grounds, (Jan. 9, 2019).

9 McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

10 Cuviello v. City of Vallejo, 944 F.3d 816 (9th Cir. 2019); Porter v. City of Philadelphia, 337 F. Supp. 3d 530 (E.D. Pa. 2018).

11 Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995); Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools, 457 F.3d 376, 211 Ed. Law Rep. 591 (4th Cir. 2006); Telemundo of Los Angeles v. City of Los Angeles, 283 F. Supp. 2d 1095 (C.D. Cal. 2003).

12 Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018).

13 Lebron v. National R.R. Passenger Corp. (Amtrak), 69 F.3d 650 (2d Cir. 1995), opinion amended on other grounds on denial of reh'g, 89 F.3d 39 (2d Cir. 1995); Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools, 457 F.3d 376, 211 Ed. Law Rep. 591 (4th Cir. 2006); United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738 (6th Cir. 2004); Eagon Through Eagon v. City of Elk City, Okl., 72 F.3d 1480 (10th Cir. 1996).

In addition to furthering a significant governmental interest, in order to comply with the First Amendment, narrowly tailored regulation of speech in a traditional public forum must not burden substantially more speech than is necessary to further the government's legitimate interests. Reynolds v. Middleton, 779 F.3d 222 (4th Cir. 2015).

14 McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

15 Wood v. Moss, 572 U.S. 744, 134 S. Ct. 2056, 188 L. Ed. 2d 1039 (2014).

16 McMahon v. City of Panama City Beach, 180 F. Supp. 3d 1076 (N.D. Fla. 2016).

17 U.S. v. Marcavage, 609 F.3d 264, 70 A.L.R.6th 753 (3d Cir. 2010); Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools, 457 F.3d 376, 211 Ed. Law Rep. 591 (4th Cir. 2006); United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738 (6th Cir. 2004); Spears v. Arizona Board of Regents, 409 F. Supp. 3d 779, 373 Ed. Law Rep. 119 (D. Ariz. 2019); Cole v. Goossen, 402 F. Supp. 3d 992 (D. Kan. 2019).

"Traditional public fora," which hold a special position in terms of First Amendment protection, are areas that have historically been open to the public for speech activities. McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

A "traditional public forum," in the context of free speech analysis, is a type of property that has the physical characteristics of a public thoroughfare, the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct, and historically and traditionally has been used for expressive conduct. Bowman v. White, 444 F.3d 967, 208 Ed. Law Rep. 96 (8th Cir. 2006); Turning Point USA at Arkansas State University v. Rhodes, 409 F. Supp. 3d 677, 373 Ed. Law Rep. 77 (E.D. Ark. 2019).

18 Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018); U.S. v. Marcavage, 609 F.3d 264, 70 A.L.R.6th 753 (3d Cir. 2010); Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools, 457 F.3d 376, 211 Ed. Law Rep. 591 (4th Cir. 2006); Cole v. Goossen, 402 F. Supp. 3d 992 (D. Kan. 2019); San Antonio Firefighters' Association, Local 624 v. City of San Antonio, 404 F. Supp. 3d 1045 (W.D. Tex. 2019).

Public streets are the archetype of a traditional public forum, for purposes of First Amendment protection of speech. Snyder v. Phelps, 562 U.S. 443, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011).

Public streets and sidewalks are traditional public fora that have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions, and thus, in such places, which occupy a special position in terms of First Amendment protection, the government's ability to restrict expressive activity is very limited. Kohn v. Southwest Regional Council of Carpenters, 289 F. Supp. 2d 1155 (C.D. Cal. 2003).

19 Initiative and Referendum Institute v. U.S. Postal Service, 417 F.3d 1299 (D.C. Cir. 2005).

20 U.S. v. Kokinda, 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990).

21 Braun v. Baldwin, 346 F.3d 761 (7th Cir. 2003).

22 Putnam Pit, Inc. v. City of Cookeville, Tenn., 221 F.3d 834, 2000 FED App. 0235P (6th Cir. 2000).

23 Mahgerefteh v. City of Torrance, 324 F. Supp. 3d 1121 (C.D. Cal. 2018).

24 American Civil Liberties Union v. Mineta, 319 F. Supp. 2d 69 (D.D.C. 2004), dismissed, 2005 WL 263924 (D.C. Cir. 2005); Calvary Chapel Church, Inc. v. Broward County, Fla., 299 F. Supp. 2d 1295 (S.D. Fla. 2003); Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc., 975 S.W.2d 546 (Tex. 1998).

25 Snowden v. Town of Bay Harbor Islands, Florida, 358 F. Supp. 2d 1178 (S.D. Fla. 2004); Cimarron Alliance Foundation v. City of Oklahoma City, Okla., 290 F. Supp. 2d 1252 (W.D. Okla. 2002); City of New Orleans v. Clark, 251 So. 3d 1047 (La. 2018); Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc., 975 S.W.2d 546 (Tex. 1998).

26 City of New Orleans v. Clark, 251 So. 3d 1047 (La. 2018); Operation Rescue-National v. Planned Parenthood of Houston and Southeast Texas, Inc., 975 S.W.2d 546 (Tex. 1998).

27 Lebron v. National R.R. Passenger Corp. (Amtrak), 69 F.3d 650 (2d Cir. 1995), opinion amended on other grounds on denial of reh'g, 89 F.3d 39 (2d Cir. 1995).

28 Globe Newspaper Co. v. Beacon Hill Architectural Com'n, 100 F.3d 175 (1st Cir. 1996); Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219, 1996 FED App. 0076P (6th Cir. 1996); Families Achieving Independence and Respect v. Nebraska Dept. of Social Services, 111 F.3d 1408 (8th Cir. 1997); City of New Orleans v. Clark, 251 So. 3d 1047 (La. 2018).

29 Globe Newspaper Co. v. Beacon Hill Architectural Com'n, 100 F.3d 175 (1st Cir. 1996); Able v. U.S., 88 F.3d 1280 (2d Cir. 1996); International Caucus of Labor Committees v. City of Montgomery, 111 F.3d 1548 (11th Cir. 1997).

30 One World One Family Now v. City of Key West, 293 F. Supp. 2d 1291 (S.D. Fla. 2003).

31 Pouillon v. City of Owosso, 206 F.3d 711, 2000 FED App. 0093P (6th Cir. 2000).

32 Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 135 S. Ct. 2239, 192 L. Ed. 2d 274 (2015).

33 Willis v. Town of Marshall, 293 F. Supp. 2d 608 (W.D. N.C. 2003).

34 Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 135 S. Ct. 2239, 192 L. Ed. 2d 274 (2015); Willis v. Town of Marshall, 293 F. Supp. 2d 608 (W.D. N.C. 2003).

35 Knight First Amendment Institute at Columbia University v. Trump, 302 F. Supp. 3d 541 (S.D. N.Y. 2018), aff'd, 928 F.3d 226 (2d Cir. 2019).

36 Members of City Council of City of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).

37 Busch v. Marple Newtown School Dist., 567 F.3d 89, 244 Ed. Law Rep. 1023 (3d Cir. 2009), as amended on other grounds, (June 5, 2009).

38 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

39 U.S. v. American Library Ass'n, Inc., 539 U.S. 194, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003).

40 Board of Regents of University of Wisconsin System v. Southworth, 529 U.S. 217, 120 S. Ct. 1346, 146 L. Ed. 2d 193, 142 Ed. Law Rep. 624 (2000).

41 Seattle Mideast Awareness Campaign v. King County, 781 F.3d 489 (9th Cir. 2015).

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16A Am. Jur. 2d Constitutional Law § 541

American Jurisprudence, Second Edition | May 2021 Update

Constitutional Law

Barbara J. Van Arsdale, J.D.; James Buchwalter, J.D; Paul M. Coltoff, J.D.; John A. Gebauer, J.D.; Lonnie E. Griffith, Jr., J.D.; Janice Holben, J.D.; Sonja Larsen, J.D.; Lucas Martin, J.D.; Anne E. Melley, J.D., LL.M., of the staff of the National Legal Research Group, Inc.; Kristina E. Music Biro, J.D., of the staff of the National Legal Research Group, Inc.; Karl Oakes, J.D.; Karen L. Schultz, J.D.; Jeffrey J. Shampo, J.D.; and Kimberly C. Simmons, J.D.

IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(10) Place Restrictions

§ 541. Designated public forums for purposes of free speech and press protections

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1509, 1510, 1745 to 1747

The government is free to open properties for expressive use by the general public or by a particular class of speakers, thereby creating "designated public fora."[1] The government may create a public forum, for purposes of the First Amendment free speech protections, by its designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for discussion of certain subjects.[2] A "designated public forum," to which First Amendment speech protections apply, exists where government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose.[3] For First Amendment purposes, an "unlimited designated public forum" is a forum designated for expressive conduct by the government but not limited to a particular type of speech or speaker.[4]

Whether a forum has been designated for expressive activity is determined by the government's intent in establishing the forum.[5] To create a "designated public forum," the government must intend to make the property generally available to a class of speakers; a designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers.[6] The government does not create a public forum for free speech purposes by inaction or by permitting limited discourse but only by intentionally opening up a nontraditional forum for public discourse;[7] even when the government opens a forum for some speech, the forum does not become a public forum if the government does not intend to open the forum without limitation.[8] That some expressive activity occurs within the context of a forum created does not imply

that the forum thereby becomes a public forum for free speech purposes.[9] The government does not create a "designated public forum" when it does no more than reserve eligibility for access to the forum to a particular class of speakers whose members must then, as individuals, obtain permission to use it.[10] If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny under First Amendment analysis.[11] The state cannot constitutionally penalize private speakers by restricting either their right to speak or the content of their speech under the First Amendment simply because the state exhibited dubious wisdom in creating or has been slovenly in its maintenance of a designated public forum.[12]

Observation:

The mere fact that the government opens a forum and is willing to accept political speech does not necessarily signal an intent to create a designated public forum for First Amendment purposes.[13]

In order to evaluate the type of forum, for purpose of determining the level of scrutiny applicable to a First Amendment challenge, a court looks to the government authority's intent with regard to the forum in question and asks whether the authority clearly and deliberately opened the space to the public.[14]

In designated public forums, the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content are subject to the same limitations as that governing a traditional public forum, namely, strict scrutiny,[15] and those based on viewpoint are prohibited.[16] Furthermore, in designated public forums, content-based restrictions on speech are prohibited unless necessary to serve compelling state interests and they are narrowly tailored to achieve those interests.[17]

Observation:

A previously designated public forum can be closed.[18]

Footnotes

1 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); Families Achieving Independence and Respect v. Nebraska Dept. of Social Services, 111 F.3d 1408 (8th Cir. 1997).

2 United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738 (6th Cir. 2004); Bowman v. White, 444 F.3d 967, 208 Ed. Law Rep. 96 (8th Cir. 2006).

3 Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018); Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 135 S. Ct. 2239, 192 L. Ed. 2d 274 (2015); Bradburn v. North Cent. Regional Library Dist., 168 Wash. 2d 789, 231 P.3d 166 (2010).

In a "designated public forum," the government makes public property that would not otherwise qualify as a traditional public forum generally accessible to all speakers. Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools, 457 F.3d 376, 211 Ed. Law Rep. 591 (4th Cir. 2006).

A "designated public forum" for First Amendment purposes consists of property not traditionally open for assembly and debate but which has been opened for expressive activity by part or all of the public. American Civil Liberties Union v. Mineta, 319 F. Supp. 2d 69 (D.D.C. 2004), dismissed, 2005 WL 263924 (D.C. Cir. 2005).

For purposes of a First Amendment analysis, a "designated public forum" is property which the state has voluntarily opened for use by the public as a place for expressive activity. Entertainment Software Ass'n v. Chicago Transit Authority, 696 F. Supp. 2d 934 (N.D. Ill. 2010).

4 Bowman v. White, 444 F.3d 967, 208 Ed. Law Rep. 96 (8th Cir. 2006).

5 Cimarron Alliance Foundation v. City of Oklahoma City, Okla., 290 F. Supp. 2d 1252 (W.D. Okla. 2002); National Ass'n for the Advancement of Colored People v. City of Philadelphia, 39 F. Supp. 3d 611 (E.D. Pa. 2014), subsequent determination, 2014 WL 7272410 (E.D. Pa. 2014), aff'd and aff'd, 834 F.3d 435 (3d Cir. 2016).

Under the First Amendment Free Speech Clause, the touchstone for determining whether a property is a "designated" or "limited" public forum is the government intent in establishing and maintaining the property, considering factors such as the policy and practice of the government, the nature of the property, and its compatibility with expressive activity. Snowden v. Town of Bay Harbor Islands, Florida, 358 F. Supp. 2d 1178 (S.D. Fla. 2004).

6 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

7 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738 (6th Cir. 2004).

8 Lebron v. National R.R. Passenger Corp. (Amtrak), 69 F.3d 650 (2d Cir. 1995), opinion amended on other grounds on denial of reh'g, 89 F.3d 39 (2d Cir. 1995).

9 United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738 (6th Cir. 2004).

10 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

11 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

12 Snowden v. Town of Bay Harbor Islands, Florida, 358 F. Supp. 2d 1178 (S.D. Fla. 2004).

13 Seattle Mideast Awareness Campaign v. King County, 781 F.3d 489 (9th Cir. 2015).

14 National Ass'n for the Advancement of Colored People v. City of Philadelphia, 39 F. Supp. 3d 611 (E.D. Pa. 2014), subsequent determination, 2014 WL 7272410 (E.D. Pa. 2014), aff'd and aff'd, 834 F.3d 435 (3d Cir. 2016).

15 Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018); Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools, 457 F.3d 376, 211 Ed. Law Rep. 591 (4th Cir. 2006); Seattle Mideast Awareness Campaign v. King County, 781 F.3d 489 (9th Cir. 2015); Seum v. Osborne, 348 F. Supp. 3d 616 (E.D. Ky. 2018).

16 Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018).

17 United Food & Commercial Workers Local 1099 v. City of Sidney, 364 F.3d 738 (6th Cir. 2004); Kuna v. Illinois Bd. of Elections, 821 F. Supp. 2d 1060 (S.D. Ill. 2011); Seum v. Osborne, 348 F. Supp. 3d 616 (E.D. Ky. 2018).

18 Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System, 327 F. Supp. 3d 767 (M.D. Pa. 2018), rev'd on other grounds, 938 F.3d 424 (3d Cir. 2019).

The government may close a designated public forum whenever it chooses. Seattle Mideast Awareness Campaign v. King County, 781 F.3d 489 (9th Cir. 2015).

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16A Am. Jur. 2d Constitutional Law § 542

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Constitutional Law
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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(10) Place Restrictions

§ 542. Limited public forums for purposes of free speech and press protections

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1509, 1510, 1741 to 1743

A.L.R. Library

Validity, under First Amendment and 42 U.S.C.A. sec. 1983, of public college or university's refusal to grant formal recognition to, or permit meetings of, student homosexual organizations on campus, 50 A.L.R. Fed. 516
Validity of 40 U.S.C.A. secs. 318-318d and implementing regulations, governing protection of federal buildings and other areas under jurisdiction of General Services Administration, 15 A.L.R. Fed. 932

When the state establishes a limited public forum, the state is not required to, and it does not allow persons to engage in every type of speech, and it may be justified in reserving its forum for certain groups or for the discussion of certain topics, but the restriction must not discriminate against speech on the basis of viewpoint and must be reasonable in light of the purpose served by the forum.[1] A "limited public forum," to which First Amendment speech protections apply, exists where the government has reserved a forum for certain groups or for the discussion of certain topics.[2] While even in a limited public forum, First

Amendment protections still exist,[3] First Amendment principles do not apply in the same way in limited public fora as in traditional public fora.[4] Indeed, a limited public forum has the least protection under the First Amendment.[5] The government has more latitude to restrict speech in a limited public forum than in a traditional public forum.[6] In a limited public forum, the government may restrict speech to groups or topics for which the forum has been created, but such restriction must be reasonable and may not discriminate on the basis of viewpoint.[7]

Observation:

Under the reasonableness test for content-based speech restrictions in a limited public forum, the government has a two-step burden, using record evidence or commonsense inferences, to (1) establish the purpose to which the government has devoted the forum, and (2) provide a legitimate explanation for the restriction. Reasonableness is a case-specific inquiry.[8]

In a limited public forum, the government is not required to and does not allow persons to engage in every type of speech;[9] only speech within the genre or subjects that the government has admitted to the limited public forum are afforded constitutional protection.[10]

When the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program.[11] Even protected speech is not equally permissible in all places and at all times; nothing in the Constitution requires the government freely to grant access to all who wish to exercise their right to free speech on every type of government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities.[12] Furthermore, the First Amendment does not demand unrestricted access to a limited public forum merely because use of that forum may be the most efficient means of delivering the speaker's message.[13] However, once it has opened a limited public forum, the state must respect the lawful boundaries it has itself set to avoid violating the First Amendment.[14]

Observation:

On a First Amendment free speech challenge, where limited access is sought by the speaker, courts apply a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.[15]

The necessity of confining a limited public forum to the limited and legitimate purpose for which it has been created may justify a state in reserving it for certain groups or discussion of certain topics, but once it has opened a limited forum, the state must respect the lawful boundaries that it has itself set and may not exclude speech where its distinction is not reasonable in light

of the purpose served by the forum nor may it discriminate against speech on the basis of viewpoint. In determining whether a state is acting to preserve the limits of a forum it has created so that the exclusion of a particular class of speech is legitimate, there is a distinction between content discrimination, which may be permissible if it preserves the purpose of the limited forum, and viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.[16]

Observation:

When a regulation governs what speech is permitted in a limited public form, and thus establishes the forum's limitations, the disparate application of that regulation can constitute viewpoint discrimination within the meaning of the First Amendment.[17]

A speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.[18] Thus, a public school's exclusion of a Christian children's club from meeting after hours at a school based on its religious nature is unconstitutional viewpoint discrimination where the school had opened its limited public forum to activities serving a variety of purposes, including events "pertaining to the welfare of the community," and had interpreted its policy to permit discussions of subjects such as "the development of character and morals from a religious perspective," but excluded the club on the ground that its activities, which included learning Bible verses, the relation of Bible stories to the members' lives, and prayer, are "the equivalent of religious instruction itself"; the fact that the club's activities were "decidedly religious in nature" does not mean that they cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint.[19] Also, a limited public forum analysis was the appropriate framework for assessing a student religious organization's allegation that a law school's policy of requiring officially recognized student groups to comply with the school's nondiscrimination policy violated the organization's First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion; such analysis adequately respected both the organization's speech and expressive-association rights and the school's interests as property owner and educational institution.[20]

CUMULATIVE SUPPLEMENT

Cases:

Courts conducting free speech forum analysis, to determine when a public university's interest in limiting the use of its property to its intended purpose outweighs interest of those wishing to use the property under the First Amendment, must first determine whether a property is a traditional public forum, a designated public forum, or a non-public forum. U.S. Const. Amend. 1. Young America's Foundation v. Kaler, 482 F. Supp. 3d 829 (D. Minn. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Good News Club v. Milford Central School, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151, 154 Ed. Law Rep. 45 (2001); McDonnell v. City and County of Denver, 238 F. Supp. 3d 1279 (D. Colo. 2017), rev'd in part on other grounds, 878 F.3d 1247 (10th Cir. 2018); Carlow v. Mruk, 425 F. Supp. 2d 225 (D.R.I. 2006).
When a unit of government creates a limited public forum for private speech, in either a literal or metaphysical sense, some content-based and speaker-based restrictions may be allowed, but even in such cases, viewpoint discrimination is forbidden. Matal v. Tam, 137 S. Ct. 1744, 198 L. Ed. 2d 366 (2017).
Where the government has opened its property for a limited purpose, it can constitutionally restrict speech consistent with that purpose as long as the regulation on speech is reasonable and not an effort to suppress expression merely because officials oppose the speaker's view. In re Brunetti, 877 F.3d 1330 (Fed. Cir. 2017), cert. granted, 139 S. Ct. 782, 202 L. Ed. 2d 510 (2019) and aff'd, 139 S. Ct. 2294, 204 L. Ed. 2d 714 (2019).

2 Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 135 S. Ct. 2239, 192 L. Ed. 2d 274 (2015); Bowman v. White, 444 F.3d 967, 208 Ed. Law Rep. 96 (8th Cir. 2006); Reza v. Pearce, 806 F.3d 497 (9th Cir. 2015); Child Evangelism Fellowship of Indiana, Inc. v. Indiana Metropolitan School District of Pike Township, 275 F. Supp. 3d 951, 350 Ed. Law Rep. 1043 (S.D. Ind. 2017); Porter v. City of Philadelphia, 337 F. Supp. 3d 530 (E.D. Pa. 2018).
A "limited forum" denotes a public facility limited to the discussion of certain subjects or reserved for some types or classes of speaker, such as an open space in a state university in which members of the university community and their guests, but not uninvited outsiders, are allowed to give talks. Women's Health Link, Inc. v. Fort Wayne Public Transportation Corp., 826 F.3d 947 (7th Cir. 2016).
A designated public forum differs from a traditional public forum in an important way; unlike in a traditional public forum, expressive activity in a designated public forum can be limited to a particular class of speakers instead of being opened to the general public. Barrett v. Walker County School District, 872 F.3d 1209, 348 Ed. Law Rep. 33 (11th Cir. 2017).

3 National Association for Advancement of Colored People v. City of Philadelphia, 834 F.3d 435 (3d Cir. 2016).

4 Ribakoff v. City of Long Beach, 27 Cal. App. 5th 150, 238 Cal. Rptr. 3d 81 (2d Dist. 2018), as modified on other grounds, (Sept. 13, 2018) and review denied, (Dec. 19, 2018) and cert. denied, 139 S. Ct. 2640, 204 L. Ed. 2d 283 (2019).

5 Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System, 327 F. Supp. 3d 767 (M.D. Pa. 2018), rev'd on other grounds, 938 F.3d 424 (3d Cir. 2019).

6 Silberberg v. Board of Elections of New York, 272 F. Supp. 3d 454 (S.D. N.Y. 2017).

7 Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools, 457 F.3d 376, 211 Ed. Law Rep. 591 (4th Cir. 2006); Northeastern Pennsylvania Freethought Society v. County of Lackawanna Transit System, 327 F. Supp. 3d 767 (M.D. Pa. 2018), rev'd on other grounds, 938 F.3d 424 (3d Cir. 2019); Ortega v. Recreation and Parks Commission for Parish of East Baton Rouge, 255 So. 3d 6 (La. Ct. App. 1st Cir. 2018); City v. Willis, 186 Wash. 2d 210, 375 P.3d 1056 (2016).
Under the First Amendment, restrictions on access to a limited public forum must be reasonable and viewpoint neutral. Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838, 57 A.L.R. Fed. 2d 573 (2010).
For a limited public forum, the state may impose reasonable regulations on speech so as to reserve the forum for its intended purposes, as long as the regulation does not suppress expression on the basis of the speaker's view. Holeton v. City of Livonia, 328 Mich. App. 88, 935 N.W.2d 601 (2019).

8 National Association for Advancement of Colored People v. City of Philadelphia, 834 F.3d 435 (3d Cir. 2016).

9 Cimarron Alliance Foundation v. City of Oklahoma City, Okla., 290 F. Supp. 2d 1252 (W.D. Okla. 2002); Windom v. Harshbarger, 396 F. Supp. 3d 675 (N.D. W. Va. 2019).

10 Cimarron Alliance Foundation v. City of Oklahoma City, Okla., 290 F. Supp. 2d 1252 (W.D. Okla. 2002).

11 Legal Services Corp. v. Velazquez, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001).

12 Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018); Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985).

13 Young America's Foundation v. Kaler, 370 F. Supp. 3d 967, 365 Ed. Law Rep. 424 (D. Minn. 2019).

14 InterVarsity Christian Fellowship/USA v. University of Iowa, 408 F. Supp. 3d 960, 372 Ed. Law Rep. 959 (S.D. Iowa 2019).

15 San Antonio Firefighters' Association, Local 624 v. City of San Antonio, 404 F. Supp. 3d 1045 (W.D. Tex. 2019).

16 Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995).

17 InterVarsity Christian Fellowship/USA v. University of Iowa, 408 F. Supp. 3d 960, 372 Ed. Law Rep. 959 (S.D. Iowa 2019).

18 Good News Club v. Milford Central School, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151, 154 Ed. Law Rep. 45 (2001).

19 Good News Club v. Milford Central School, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151, 154 Ed. Law Rep. 45 (2001).

20 Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838, 57 A.L.R. Fed. 2d 573 (2010).

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16A Am. Jur. 2d Constitutional Law § 543

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Constitutional Law

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(10) Place Restrictions

§ 543. Nonpublic forums for purposes of free speech and press protections

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1509, 1510, 1749 to 1751, 1969

A.L.R. Library

Validity, under First Amendment and 42 U.S.C.A. sec. 1983, of public college or university's refusal to grant formal recognition to, or permit meetings of, student homosexual organizations on campus, 50 A.L.R. Fed. 516

Validity of 40 U.S.C.A. secs. 318-318d and implementing regulations, governing protection of federal buildings and other areas under jurisdiction of General Services Administration, 15 A.L.R. Fed. 932

A "nonpublic forum" consists of public property which is not by tradition or designation a forum for public communication.[1] To maintain a nonpublic forum, the government must employ selective access policies whereby forum participation is governed by individual, nonministerial judgments.[2] Implicit in the concept of a nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity; these distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.[3]

Where a property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all for purposes of First Amendment analysis.[4] Whether the location is a public or nonpublic forum determines the extent to which First Amendment free speech rights may be exercised and the amount of consideration the courts must give governmental interests engendering restrictions on those rights.[5]

In addition to time, place, and manner regulations, the state may reserve a nonpublic forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.[6] While First Amendment protections still exist in a nonpublic forum,[7] the government has much more flexibility to craft rules limiting speech in a nonpublic forum than it has with regard to public forums.[8] When the government permits speech on government property that is a nonpublic forum, it may exclude speakers on the basis of their subject matter, as long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum.[9]

Observation:

Under the reasonableness test for content-based speech restrictions in a nonpublic forum, the government has a two-step burden, using record evidence or commonsense inferences, to (1) establish the purpose to which the government has devoted the forum, and (2) provide a legitimate explanation for the restriction. Reasonableness is a case-specific inquiry.[10]

The government can restrict access to a nonpublic forum as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view.[11] To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint and must otherwise be reasonable in light of the purpose of the property.[12]

The government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy.[13]

Observation:

The United States Supreme Court employs a distinct standard of review to assess speech restrictions in nonpublic forums because the government, no less than a private owner of property, retains the power to preserve the property under its control for the use to which it is lawfully dedicated.[14]

Footnotes

1 Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018); Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools, 457 F.3d 376, 211 Ed. Law Rep. 591 (4th Cir. 2006); Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir. 1996); American Civil Liberties Union Foundation v. Washington Metropolitan Area Transit Authority, 303 F. Supp. 3d 11 (D.D.C. 2018).

2 Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools, 457 F.3d 376, 211 Ed. Law Rep. 591 (4th Cir. 2006).

3 Carlow v. Mruk, 425 F. Supp. 2d 225 (D.R.I. 2006).

4 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

5 Telemundo of Los Angeles v. City of Los Angeles, 283 F. Supp. 2d 1095 (C.D. Cal. 2003).

6 Lebron v. National R.R. Passenger Corp. (Amtrak), 69 F.3d 650 (2d Cir. 1995), opinion amended on other grounds on denial of reh'g, 89 F.3d 39 (2d Cir. 1995); Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools, 457 F.3d 376, 211 Ed. Law Rep. 591 (4th Cir. 2006); Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004).

7 National Association for Advancement of Colored People v. City of Philadelphia, 834 F.3d 435 (3d Cir. 2016).

8 Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018).
Government restrictions on free speech in nonpublic fora require a less rigorous justification than in traditional public fora and in designated public fora. Cole v. Goossen, 402 F. Supp. 3d 992 (D. Kan. 2019).

9 Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 127 S. Ct. 2372, 168 L. Ed. 2d 71 (2007); Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011); U.S. v. Szabo, 760 F.3d 997 (9th Cir. 2014); Coffelt v. Omaha School District, 309 F. Supp. 3d 629, 356 Ed. Law Rep. 110 (W.D. Ark. 2018); New Century Foundation v. Robertson, 400 F. Supp. 3d 684 (M.D. Tenn. 2019); Ortega v. Recreation and Parks Commission for Parish of East Baton Rouge, 255 So. 3d 6 (La. Ct. App. 1st Cir. 2018); City v. Willis, 186 Wash. 2d 210, 375 P.3d 1056 (2016).

10 National Association for Advancement of Colored People v. City of Philadelphia, 834 F.3d 435 (3d Cir. 2016).

11 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998); Jacobsen v. Howard, 109 F.3d 1268 (8th Cir. 1997); Coffelt v. Omaha School District, 309 F. Supp. 3d 629, 356 Ed. Law Rep. 110 (W.D. Ark. 2018); San Antonio Firefighters' Association, Local 624 v. City of San Antonio, 404 F. Supp. 3d 1045 (W.D. Tex. 2019).

12 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998).

13 Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018).

14 Minnesota Voters Alliance v. Mansky, 138 S. Ct. 1876, 201 L. Ed. 2d 201 (2018).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(10) Place Restrictions

§ 544. Private property for purposes of free speech and press protections

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1509, 1510, 1735, 1780 to 1782, 1876

A.L.R. Library

Restrictive Covenants or Homeowners' Association Regulations Restricting or Prohibiting Flags, Signage, or the Like on Homeowner's Property as Restraint on Free Speech, 51 A.L.R.6th 533

Validity of Statutes and Ordinances Regulating the Operation of Sexually Oriented Businesses—Nature of Regulation, 23 A.L.R.6th 573

Validity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses—Types of Businesses Regulated, 21 A.L.R.6th 425

Validity of Statutes and Ordinances Regulating Operation of Sexually Oriented Businesses—Legal Issues and Principles, 20 A.L.R.6th 161

Trial Strategy

Proof of Homeowner Association Acting as Quasi Governmental Entity Whose Conduct Constitutes State Action Requiring Declaration of Rights Under Homeowner Association Restriction Prohibiting Political Signs, 76 Am. Jur. Proof of Facts 3d 89

As an initial matter, a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns.[1] The right to exercise First Amendment privileges may be legally restricted under some circumstances on private property by the owners of the property themselves,[2] such as those who own a housing development or an apartment house.[3]

Although privately owned shopping centers are required to respect individual free speech rights on their premises to the same extent that government entities are bound to observe state and federal free speech rights, nevertheless such shopping malls may impose reasonable restrictions on the time, place, and manner of expressive activities.[4] Thus, for federal constitutional purposes, a privately owned and operated shopping center generally open to the public is not so dedicated to public use as to require the owner of the center to permit the distribution of handbills, circulars, or petitions unrelated to the shopping center's operations[5] or for the purpose of advertising a strike against one of the stores.[6] Indeed, the distribution of leaflets in a privately owned shopping mall is not an activity protected as a right of free speech.[7]

Observation:

The states are free to set different rules for shopping centers if they so desire, and some have done so, since the United States Supreme Court has expressly ruled that the fact that the First Amendment does not prevent a private shopping center owner from prohibiting distribution on the center's premises of handbills unrelated to the center's operation does not limit each state's authority to exercise its police power or its sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution.[8]

Special respect for individual liberty in one's own home has long been a part of our culture and our law, and that principle has special resonance when the government seeks to constrain a person's ability to speak there. Thus, a city ordinance banning all residential signs except those falling within one of the exemptions violates a homeowner's right to free speech.[9] Likewise, ordinances which completely ban all residential yard signs, commercial and noncommercial, except those displaying the residents' names and addresses and pertinent Social Security information, are deemed not narrowly tailored to serve a significant government interest in aesthetics; by banning yard signs altogether, with the exception only for the minimal amount of information necessary for safety and security reasons, the city burdens substantially more speech than is necessary because it completely forecloses an inexpensive and autonomous way to communicate.[10]

Observation:

The Constitution will not protect a speaker with a bullhorn bellowing outside a home in the early morning hours.[11]

Footnotes

1 Morgan v. Bevin, 298 F. Supp. 3d 1003 (E.D. Ky. 2018).

2 Aluli v. Trusdell, 54 Haw. 417, 508 P.2d 1217 (1973); People v. Bush, 39 N.Y.2d 529, 384 N.Y.S.2d 733, 349 N.E.2d 832 (1976) (private store).

3 Watchtower Bible & Tract Soc. v. Metropolitan Life Ins. Co., 297 N.Y. 339, 79 N.E.2d 433, 3 A.L.R.2d 1423 (1948).

4 United Broth. of Carpenters and Joiners of America Local 586 v. N.L.R.B., 540 F.3d 957 (9th Cir. 2008), as corrected on other grounds, (Oct. 28, 2008).

5 Lloyd Corp., Limited v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972).

6 Hudgens v. N. L. R. B., 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

7 City of West Des Moines v. Engler, 641 N.W.2d 803 (Iowa 2002).

8 PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980) (holding that no federal constitutional rights of a shopping center owner are violated by a provision of the California Constitution which protects and allows the exercise of free speech and petitioning, reasonably exercised, in privately owned shopping centers).

9 City of Ladue v. Gilleo, 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994).

10 Cleveland Area Bd. of Realtors v. City of Euclid, 88 F.3d 382, 1996 FED App. 0197P (6th Cir. 1996).

11 State v. Burkert, 231 N.J. 257, 174 A.3d 987 (2017).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(10) Place Restrictions

§ 545. Public buildings and other public property for purposes of free speech and press protections

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1509, 1510, 1758, 1763, 1765 to 1770

A.L.R. Library

Validity of 40 U.S.C.A. secs. 318-318d and implementing regulations, governing protection of federal buildings and other areas under jurisdiction of General Services Administration, 15 A.L.R. Fed. 932

Peaceful demonstrations in public buildings as expressions of freedom of speech and freedom to petition the government for a redress of grievances have been upheld in some cases as constitutionally protected activities against infringement by state or local regulation where the activity has been peaceful and has not obstructed the public's use of the building,[1] and the peaceful distribution of literature in a public transportation terminal may not be interfered with.[2] However, limiting access to public buildings to nonadvocacy groups has been upheld under the circumstances of the case.[3] The courts also have sustained statutes or regulations which either expressly or as applied prohibit expression of views, assemblies, demonstrations, or protests on jail

grounds,[4] in or near a courthouse,[5] including the United States Supreme Court,[6] within or near a state capitol building,[7] or on a city-operated transit system.[8]

Both a statute prohibiting persons from entering a military base for a purpose prohibited by lawful regulation and a regulation generally prohibiting political demonstrations at the base are facially reasonable under the First Amendment in light of the traditional need of the military to retain control over the scope and extent of public activity and speech permitted on military bases, the interest of the government in keeping official military activities free of entanglement with partisan political campaigns, and the military commanding officer's practically exclusive power to admit private persons to, or exclude them from, the area of his or her command in the interest of good order and military discipline.[9] However, a state statute prohibiting the solicitation of votes and displays or distributions of campaign materials within 100 feet of the entrance to a polling place, as a facially content-based restriction on political speech in a public forum, is subject to exacting scrutiny under the First Amendment; thus, the state is required to show that the regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.[10]

Footnotes

1 Brown v. State of La., 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966) (public library).

2 Board of Airport Com'rs of City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 107 S. Ct. 2568, 96 L. Ed. 2d 500 (1987).

3 Families Achieving Independence and Respect v. Nebraska Dept. of Social Services, 111 F.3d 1408 (8th Cir. 1997) (the policy of the state welfare office to limit access to its lobby to nonadvocacy groups which provided direct benefits meeting welfare clients' basic needs, while denying such access to advocacy groups with political agendas, does not violate the First Amendment; the policy regulating expressive activities in the lobby was not vague, unreasonable, or viewpoint-based, and thus it meets the criteria for regulation of speech in a nonpublic forum).

4 Adderley v. State of Fla., 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966).

5 Cameron v. Johnson, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1968).
A notice of trespass, under which a protester is prohibited from being on the grounds of a state courthouse, is a violation of the protester's First Amendment right of access to the courts, despite the court's interest in the security of judicial persons, property, and proceedings, where the means chosen to protect the courthouse from whatever threat an individual protester presented are not narrowly tailored to the alleged threat inasmuch as they barred the protester indefinitely and virtually completely. Huminski v. Corsones, 396 F.3d 53 (2d Cir. 2005).

6 U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983).

7 Simpson v. Municipal Court, 14 Cal. App. 3d 591, 92 Cal. Rptr. 417 (3d Dist. 1971).
A state's administrative rule's "first-come, first used" provision, allowing one who has not obtained a permit to use the state capitol steps to still use the steps on a first-come, first-used basis, did not offend the First Amendment Free Speech Clause, where the provision granted priority of use to a permit applicant while at the same time freely allowing nonpermitted use to the extent public safety was not compromised. Watters v. Otter, 986 F. Supp. 2d 1162 (D. Idaho 2013).

8 Lehman v. City of Shaker Heights, 418 U.S. 298, 94 S. Ct. 2714, 41 L. Ed. 2d 770 (1974).

9 U.S. v. Corrigan, 144 F.3d 763 (11th Cir. 1998).

10 Burson v. Freeman, 504 U.S. 191, 112 S. Ct. 1846, 119 L. Ed. 2d 5 (1992).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(10) Place Restrictions

§ 546. Public schools, colleges, and universities for purposes of free speech and press protections

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1509, 1510, 1730, 1969, 2007

A.L.R. Library

Validity, under First Amendment and 42 U.S.C.A. sec. 1983, of public college or university's refusal to grant formal recognition to, or permit meetings of, student homosexual organizations on campus, 50 A.L.R. Fed. 516

Validity, under Federal Constitution, of public school or state college regulation of student newspapers, magazines, or other publications—federal cases, 16 A.L.R. Fed. 182

The First Amendment rights of speech and association extend to the campuses of state universities.[1] However, the state may impose reasonable regulations as to the time, place, and manner of speech on school property as long as the regulations are not based on the content of the speech.[2] Indeed, public educational institutions have the right to adopt and enforce reasonable, nondiscriminatory regulations as to the time, place, and manner of student expressions and demonstrations.[3]

Observation:

In a public school setting, a school district may permissibly regulate a broader range of speech than could be regulated for the general public, giving school regulations a larger plainly legitimate sweep.[4]

A school may categorically prohibit speech that is (1) lewd, vulgar, or profane; (2) school-sponsored speech on the basis of a legitimate pedagogical concern; and (3) speech that advocates illegal drug use; if school speech does not fit within one of those exceptions, it may be prohibited only if it would substantially disrupt school operations.[5]

The First Amendment protects a private high school's right to publish truthful information about the school and its athletic programs and likewise protect the school's right to try to persuade prospective students and their parents that its excellence in sports is a reason for enrolling, although the school's speech rights are not absolute. The enforcement by a state interscholastic athletic association of its antirecruiting rule, prohibiting high schools from using undue influence to recruit middle school students for athletic programs, does not violate the First Amendment rights of a private high school, a voluntary association member, whose football coach sent letters inviting some middle school students to attend spring practice sessions, as the rule furthered the association's interests in managing an efficient and effective state-sponsored high school athletic league.[6]

Footnotes

1 Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440, 1 Ed. Law Rep. 13 (1981).

2 Grattan v. Board of School Com'rs of Baltimore City, 805 F.2d 1160, 36 Ed. Law Rep. 56 (4th Cir. 1986). As to the validity of statutes or regulations governing the use of school property for nonschool purposes as affected by the constitutional right of free speech, see Am. Jur. 2d, Schools § 101.

3 Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 188 Ed. Law Rep. 620 (11th Cir. 2004).

4 J.S. ex rel. Snyder v. Blue Mountain School Dist., 650 F.3d 915, 271 Ed. Law Rep. 656, 91 A.L.R.6th 687 (3d Cir. 2011).

5 H. v. Easton Area School Dist., 827 F. Supp. 2d 392, 279 Ed. Law Rep. 655 (E.D. Pa. 2011), aff'd, 725 F.3d 293, 296 Ed. Law Rep. 752 (3d Cir. 2013).

6 Tennessee Secondary School Athletic Ass'n v. Brentwood Academy, 551 U.S. 291, 127 S. Ct. 2489, 168 L. Ed. 2d 166, 220 Ed. Law Rep. 39 (2007).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(10) Place Restrictions

§ 547. Streets, sidewalks, and parks for purposes of free speech and press protections

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1509, 1510, 1759 to 1761

Streets, sidewalks, parks,[1] and, to some extent, certain other public places[2] are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising those rights cannot be denied broadly and absolutely. Consistent with the traditionally open character of public streets and sidewalks, the government's ability to restrict speech in such locations is very limited.[3] However, even on property that has traditionally been open to the public for speech or expressive activity, such as sidewalks, the government may impose reasonable restrictions on the time, place, or manner of protected speech.[4] Certainly, protesters have no First Amendment right to cordon off a street or an entrance to a public or private building and allow no one to pass who does not agree to listen to their exhortations.[5]

Observation:

Laws affecting speech in traditional public fora like sidewalks and city streets are presumptively invalid under the First Amendment.[6]

Caution:

The free speech guarantee of the Federal Constitution's First Amendment, as currently construed by the United States Supreme Court, does not extend to speech activities on privately owned sidewalks in front of the entrances to stores, whether or not those stores are located in shopping centers and whether or not the speech pertains to a labor dispute.[7]

For purposes of a challenge to an ordinance banning the sales of goods, such as message-bearing T-shirts, and services on streets and sidewalks, a city has substantial interests in eliminating the visual blight of vendor stands, assuring the orderly movement of pedestrians on crowded sidewalks and protecting local merchants from unfair competition.[8]

The permitting scheme under a parks ordinance is not facially invalid where the government has a legitimate interest in requiring a permit for the use of its parks, and the fact that the ordinance does not define the phrases "public meeting or gathering" or "designated areas of the park" does not render it unconstitutionally vague or overbroad or an impermissible prior restraint on speech.[9] Similarly, a regulation and policy statement requiring a permit for the sale or distribution of printed matter within a national park is a reasonable time, place, or manner restriction under the First Amendment where the National Park Service grants permits irrespective of content, the regulation and statement are narrowly tailored to serve a significant interest in maintaining the safety and attractiveness of park grounds, and alternative means to communicate are left open inasmuch as pamphlets can be sold or distributed without a permit on an adjacent boulevard and oral communication is also permitted.[10]

The government has a legitimate interest in ensuring that national parks are adequately protected, and if the parks would be more exposed to harm without a sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation on the manner in which a demonstration may be carried out. A ban upon sleeping in certain areas of national parks responds precisely to substantive problems legitimately concerning the government.[11]

Footnotes

1 Bruni v. City of Pittsburgh, 941 F.3d 73 (3d Cir. 2019); Knight Riders of Ku Klux Klan v. City of Cincinnati, 72 F.3d 43, 1995 FED App. 0378P (6th Cir. 1995); Cuviello v. City of Vallejo, 944 F.3d 816 (9th Cir. 2019); Eagon Through Eagon v. City of Elk City, Okl., 72 F.3d 1480 (10th Cir. 1996).
A street or a park is a quintessential forum for the exercise of First Amendment free speech rights. Packingham v. North Carolina, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017).
Public ways and sidewalks occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate. McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014); Price v. City of Chicago, 915 F.3d 1107 (7th Cir. 2019).
Public streets and parks are the archetype of a traditional public forum, for free speech purposes; indeed, they occupy a special position in terms of First Amendment protection, because time out of mind public

streets and sidewalks have been used for public assembly and debate. Chase v. Town of Ocean City, 825 F. Supp. 2d 599 (D. Md. 2011).

2 Families Achieving Independence and Respect v. Nebraska Dept. of Social Services, 111 F.3d 1408 (8th Cir. 1997); Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir. 1996).

3 McCullen v. Coakley, 573 U.S. 464, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

4 Deferio v. City of Syracuse, 306 F. Supp. 3d 492 (N.D. N.Y. 2018), appeal dismissed, (C.A.2 18-514) (June 18, 2018) and aff'd, 770 Fed. Appx. 587 (2d Cir. 2019).

5 Terry v. Reno, 101 F.3d 1412 (D.C. Cir. 1996).

6 Boyer v. City of Simi Valley, 401 F. Supp. 3d 943 (C.D. Cal. 2019).

7 Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8, 55 Cal. 4th 1083, 150 Cal. Rptr. 3d 501, 290 P.3d 1116 (2012).

As to private property, generally, see § 544.

8 One World One Family Now v. City and County of Honolulu, 76 F.3d 1009 (9th Cir. 1996); International Caucus of Labor Committees v. City of Montgomery, 111 F.3d 1548 (11th Cir. 1997).

9 Service Employees Intern. Union v. City of Houston, 542 F. Supp. 2d 617 (S.D. Tex. 2008), aff'd in part, rev'd in part and remanded on other grounds, 595 F.3d 588 (5th Cir. 2010).

10 U.S. v. Kistner, 68 F.3d 218 (8th Cir. 1995).

As to use of public parks, squares, and commons for meetings, public addresses, parades, and similar group activities, see Am. Jur. 2d, Parks, Squares, and Playgrounds § 22.

11 Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984); Mahoney v. Babbitt, 105 F.3d 1452 (D.C. Cir. 1997).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(11) Manner of Regulation, Restriction, or Infringement of Rights

§ 548. Manner of regulation, restriction, or infringement of rights as affected by freedom of speech and press, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1509, 1510

A.L.R. Library

Restrictive Covenants or Homeowners' Association Regulations Restricting or Prohibiting Flags, Signage, or the Like on Homeowner's Property as Restraint on Free Speech, 51 A.L.R.6th 533

The permissible methods of regulation of free speech and press may vary with the various means of utterance.[1] In dealing with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method or manner by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied. The procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford.[2] Complete speech bans, unlike content-neutral restrictions on the time, place, or manner of expression, foreclose alternative means of disseminating certain information,

and thus are particularly dangerous and warrant more careful constitutional review.[3] The First Amendment requires that the government's chosen restriction on speech be actually necessary to achieve its interest; there must be a direct causal link between the restriction imposed and the injury to be prevented.[4] In order to survive intermediate scrutiny under the First Amendment, a law that imposes a burden on speech must be narrowly tailored to serve a significant governmental interest; in other words, the law must not burden substantially more speech than is necessary to further the government's legitimate interests.[5] A speech-restrictive law with widespread impact gives rise to far more serious concerns than could any single supervisory decision, and thus, when such a law is at issue, the government must shoulder a correspondingly heavier burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights.[6] A statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible to application to protected expression; because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.[7] The government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.[8]

Observation:

Assessing the fit of a proposed restriction on the right to freedom of speech requires consideration of available alternatives that would serve the state's interests while avoiding unnecessary abridgment of First Amendment rights.[9]

While licensing[10] and taxation[11] have been the most common forms of regulation affecting the First Amendment guarantees of freedom of speech and of the press, they are by no means the only ones. Indeed, the government offends the First Amendment when it imposes any sort of financial burdens on certain speakers based on the content of their expression, and when the government targets not the subject matter but the particular views taken by a speaker on a particular subject, a violation of the First Amendment is automatically inferred.[12]

Observation:

The test used to determine whether governmental regulation infringes upon First Amendment rights does not require the government to use the least intrusive means of regulation; as long as the means chosen are not substantially broader than necessary to achieve the government's interest, the regulation will not be invalid simply because a court concludes that the government's interest can be adequately served by some less speech-restrictive alternative.[13]

Under a statutory provision protecting conduct in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest, "conduct" is not limited to actions such as picketing or demonstrations but includes written or oral statements.[14]

Footnotes

1 Kingsley Intern. Pictures Corp. v. Regents of University of N.Y., 4 N.Y.2d 349, 175 N.Y.S.2d 39, 151 N.E.2d 197 (1958), judgment rev'd on other grounds, 360 U.S. 684, 79 S. Ct. 1362, 3 L. Ed. 2d 1512 (1959).

2 Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958).

3 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996).

4 U.S. v. Alvarez, 567 U.S. 709, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012).

5 Packingham v. North Carolina, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017).
The appropriate inquiry for a regulation that targets the secondary effects of speech is whether it is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication. U.S. v. Richards, 755 F.3d 269 (5th Cir. 2014).

6 Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018).

7 Government of Virgin Islands v. Vanterpool, 61 V.I. 817, 767 F.3d 157 (3d Cir. 2014).

8 Berger v. City of Seattle, 569 F.3d 1029 (9th Cir. 2009).

9 Free and Fair Election Fund v. Missouri Ethics Commission, 903 F.3d 759 (8th Cir. 2018), cert. denied, 139 S. Ct. 1601, 203 L. Ed. 2d 755 (2019).
A municipality may not broadly prohibit free expression when satisfactory alternatives exist. Josephine Havlak Photographer, Inc. v. Village of Twin Oaks, 864 F.3d 905 (8th Cir. 2017), cert. denied, 138 S. Ct. 986, 200 L. Ed. 2d 250 (2018).

10 § 550.

11 § 552.

12 Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700, 101 Ed. Law Rep. 552 (1995).

13 Ross v. Early, 746 F.3d 546 (4th Cir. 2014); Rosenblatt v. City of Houston, 31 S.W.3d 399 (Tex. App. Corpus Christi 2000).
An ordinance need not be the least restrictive or least intrusive means of regulating public space. Josephine Havlak Photographer, Inc. v. Village of Twin Oaks, 864 F.3d 905 (8th Cir. 2017), cert. denied, 138 S. Ct. 986, 200 L. Ed. 2d 250 (2018).

14 Carver v. Bonds, 135 Cal. App. 4th 328, 37 Cal. Rptr. 3d 480 (1st Dist. 2005).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(11) Manner of Regulation, Restriction, or Infringement of Rights

§ 549. Manner of regulation of canvassing, soliciting, and house-to-house distribution of written material as affected by freedom of speech and press

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1509, 1510

The house-to-house distribution of written material is one of the principal and protected constitutional means of implementing the First Amendment right of communication.[1] Regulation in the area of canvassing and soliciting must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly.[2] A municipality however, does have the power to protect its citizens from crime and undue annoyance by regulating soliciting and canvassing, and a narrowly drawn ordinance, which does not vest in municipal officials the undefined power to determine what messages residents will hear, may serve such important interests without running afoul of the First Amendment.[3] However, a city ordinance requiring canvassers to register with the city's police department prior to going door to door, either to distribute materials or to discuss "issues of public or religious interest," abridges the freedom of speech in violation of the First Amendment, since the ordinance extended to core free speech areas, regulated the distribution of written material without limitation, and affected spontaneous speech and anonymous advocacy, while not being tailored to the city's stated interests in preventing fraud and crime, given, for example, the lack of a showing that registration is likely to have a material impact on incidents of burglary or violent crime.[4] Similarly, a municipal ordinance requiring that any person desiring to canvass or solicit from house to house for a "recognized charitable cause" or for a "federal, state, county, or municipal political campaign or cause," must "notify the Police Department, in writing, for identification only," is unconstitutional.[5] Also, the right of free speech is violated by a

municipal ordinance absolutely prohibiting the distribution of literature from door to door,[6] or conditioning the permissibility of such distribution upon a permit[7] to be granted by an administrative officer at his or her discretion,[8] or upon payment of a flat, as distinguished from a mere nominal, license tax.[9]

The fact that a licensing ordinance is construed to apply only to solicitation from house to house does not relieve it from the objection that as applied to the dissemination of religious beliefs, it is an unconstitutional invasion of the rights of freedom of speech and of the press where the ordinance as drawn is not confined to the prevention of abuses or evils arising from that type of solicitation but instead sets aside residential areas of the municipality as a zone prohibited to all solicitors unless a license tax is paid.[10] A regulation which, under the principles stated above, unduly limits the house-to-house distribution of literature cannot be justified by the fact that fraudulent appeals may be made in the name of charity and religion[11] or that the inhabitants of the city, an industrial community, frequently work at irregular hours so that casual bell pushers might seriously interfere with their hours of sleep, or that burglars frequently pose as canvassers, thus creating a danger to property.[12]

The balancing of the right to privacy and the right to free speech and publication involved in house-to-house canvassing is not required in the case of on-the-street publication. On a public way, the citizen must accept the inconvenience of political proselytizing as essential to the preservation of a republican form of government.[13]

Footnotes

1 Van Nuys Pub. Co. v. City of Thousand Oaks, 5 Cal. 3d 817, 97 Cal. Rptr. 777, 489 P.2d 809 (1971).

2 Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976). Generally, as to the regulation of peddlers, solicitors, itinerant merchants, and others engaged in similar occupations as affected by the First Amendment freedoms of speech, press, or religion, see Am. Jur. 2d, Peddlers, Solicitors, and Transient Dealers §§ 43 to 54.

3 Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).

4 Service Employees Intern. Union, Local 3 v. Municipality of Mt. Lebanon, 446 F.3d 419 (3d Cir. 2006).

5 Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).

6 Martin v. City of Struthers, Ohio, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943).

7 Lovell v. City of Griffin, Ga., 303 U.S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (1938).

8 Largent v. State of Tex., 318 U.S. 418, 63 S. Ct. 667, 87 L. Ed. 873 (1943).

9 Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A.L.R. 81 (1943).

10 Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A.L.R. 81 (1943).

11 Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (1939).

12 Martin v. City of Struthers, Ohio, 319 U.S. 141, 63 S. Ct. 862, 87 L. Ed. 1313 (1943).

13 City of Bowling Green v. Lodico, 11 Ohio St. 2d 135, 40 Ohio Op. 2d 133, 228 N.E.2d 325 (1967).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(11) Manner of Regulation, Restriction, or Infringement of Rights

§ 550. Licensing or permit requirements as affected by freedom of speech and press

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1508 to 1510, 1590 to 1592

Although the constitutionality of a particular permit requirement to exercise a First Amendment right depends on factors unique to each case, such as the nature of the forum, the scope of the permitting agency's discretion, and the reason for the restriction,[1] as a general rule, regulations conditioning expressive activity upon obtaining a permit constitute a prior restraint on such speech.[2] Permitting schemes are subject to a First Amendment facial challenge if they have a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat that protected speech or conduct will be suppressed.[3] To be a valid time, place, and manner restriction for purposes of the First Amendment, a permitting ordinance (1) must not delegate overly broad discretion to a government official, (2) must not be based on the message's content, (3) must be narrowly tailored to serve a significant governmental interest, and (4) must leave open ample alternatives for communication. Unless an ordinance has definite and objective guiding standards, permit requirements present a threat of content-based, discriminatory enforcement. Permitting guidelines must be sufficiently specific and objective so as to effectively place some limits on the authority of government officials to deny a permit.[4] If a permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgment of First Amendment freedoms is too great to be permitted.[5] The doctrine forbidding unbridled discretion with respect to issuing a government permit for speech or speech-related activity requires that any limits the government claims are implicit in a permitting ordinance must be made explicit by textual incorporation, binding judicial or administrative construction, or by well-

established practice.[6] A permitting system, particularly in combination with other alternatives, may enable a content-neutral restriction on speech to pass constitutional muster.[7]

Observation:

A permitting requirement is a prior restraint on speech and therefore bears a heavy presumption against its constitutionality.[8]

In light of the states' and municipalities' longstanding authority to license activities within their borders, a licensing requirement must further impede First Amendment interests in order to raise expression-related constitutional concerns, such as when the licensing requirement inhibits the ability or the inclination to engage in protected expression.[9] In the area of free expression, a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.[10] Any regulation which makes dissemination of ideas depend upon the broad discretionary approval of the distributor by an official constitutes administrative censorship in an extreme form.[11] A plaintiff may bring a facial unbridled discretion challenge under the First Amendment if (1) there is a First Amendment censorship risk of either self-censorship by speakers in order to avoid being denied a license to speak or difficulty of effectively detecting, reviewing, and correcting content-based censorship as applied without standards by which to measure the licensor's action, and (2) law has a close enough nexus to expression, or to conduct commonly associated with expression, to pose a real and substantial threat of the identified censorship risks.[12] To avoid the danger of censorship, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority.[13] In addition, a licensing scheme involving a prior restraint must provide both a reasonable time frame for the licensing authority to issue or deny a license and a prompt judicial review if the license is denied.[14] There must be prompt judicial review of the licensor's decision to regulate speech which includes a prompt judicial decision.[15] If a state or municipality's licensing regime swept in mainstream performances and imposed a substantial fee on licensees, required a substantial waiting period before an applicant could obtain a license, or lacked a meaningful mechanism for an applicant to challenge an adverse licensing decision, the licensing requirement could unduly burden protected speech.[16]

Observation:

A facial challenge to a licensing law lies whenever the licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers.[17]

The fact that a state may choose to require a license to its liquor retailers does not authorize the state to condition a conferral of that benefit upon the surrender of the retailers' constitutional right to freedom of speech and does not justify the state's complete ban on the advertising of retail prices of alcoholic beverages.[18]

A charitable solicitation statute's licensing requirement that professional fundraisers must await a determination regarding their license applications before engaging in solicitation, while volunteer fundraisers or those employed by the charity could solicit immediately upon submitting an application, unconstitutionally permits unlimited delays in issuing licenses to professional fundraisers.[19]

A licensing system need not effect total suppression in order to create a prior restraint on free speech.[20] Thus, an ordinance requiring a license in connection with the operation of sexually oriented businesses, as enforced, has been held an unconstitutional prior restraint on the licensees' First Amendment rights because the ordinance lacked a necessary limitation on the period of time during which the licensor had to make a decision whether to issue a license, during which the status quo was maintained, and the ordinance did not provide the possibility for prompt judicial review in the event the license was erroneously denied.[21]

Observation:

To overcome the presumption of invalidity under the First Amendment, a scheme for licensing sexually oriented businesses must incorporate two procedural safeguards; first, the decision whether to issue a license must be made within a specified, and brief, time period, and the status quo must be maintained during that period and during the course of any judicial review, and second, there must be an assurance that a judicial decision, if sought by the applicant, can be obtained seasonably.[22]

A municipal park ordinance requiring individuals to obtain a permit before conducting more-than-50-person events sufficiently limits the licensing official's discretion to satisfy First Amendment concerns where the ordinance specified the reason for which the permit can be denied, required explanations for the denial, and placed time limits on the processing of permit applications.[23]

Footnotes

1 O'Toole v. Superior Court, 140 Cal. App. 4th 488, 44 Cal. Rptr. 3d 531, 209 Ed. Law Rep. 800 (4th Dist. 2006).

2 Green v. City Of Raleigh, 523 F.3d 293 (4th Cir. 2008); People v. Mendelson, 24 Misc. 3d 307, 875 N.Y.S.2d 766 (Dist. Ct. 2009).
As to freedom from prior restraint and censorship, generally, see § 475.

3 Epona v. County of Ventura, 876 F.3d 1214 (9th Cir. 2017).

4 Spirit of Aloha Temple v. County of Maui, 384 F. Supp. 3d 1231 (D. Haw. 2019), motion to certify appeal denied, 2019 WL 2146237 (D. Haw. 2019).

5 International Outdoor, Inc. v. City of Troy, 361 F. Supp. 3d 713 (E.D. Mich. 2019).

6 City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

7 McClellan v. City of Alexandria, 363 F. Supp. 3d 665 (E.D. Va. 2019).

8 Berger v. City of Seattle, 569 F.3d 1029 (9th Cir. 2009).

9 American Entertainers, L.L.C. v. City of Rocky Mount, North Carolina, 888 F.3d 707 (4th Cir. 2018).

10 City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988).

11 Mayor and Aldermen of City of Savannah v. TWA, Inc., 233 Ga. 885, 214 S.E.2d 370 (1975).

12 Moore v. Brown, 868 F.3d 398 (5th Cir. 2017).

13 Melrose, Inc. v. City of Pittsburgh, 613 F.3d 380 (3d Cir. 2010); American Entertainers, L.L.C. v. City of Rocky Mount, North Carolina, 888 F.3d 707 (4th Cir. 2018); Eliason v. City of Rapid City, 306 F. Supp. 3d 1131 (D.S.D. 2018).

14 Eliason v. City of Rapid City, 306 F. Supp. 3d 1131 (D.S.D. 2018); Stearn v. County of San Bernardino, 170 Cal. App. 4th 434, 88 Cal. Rptr. 3d 330 (4th Dist. 2009).

15 729, Inc. v. Kenton County Fiscal Court, 515 F.3d 485 (6th Cir. 2008).

16 American Entertainers, L.L.C. v. City of Rocky Mount, North Carolina, 888 F.3d 707 (4th Cir. 2018).

17 Green v. U.S. Department of Justice, 392 F. Supp. 3d 68 (D.D.C. 2019); Stagg P.C. v. U.S. Department of State, 354 F. Supp. 3d 448 (S.D. N.Y. 2019).

18 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996).

19 Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

20 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 95 S. Ct. 1239, 43 L. Ed. 2d 448 (1975).

21 FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) (holding modified on other grounds by, City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004)).

22 S.A. Restaurants, Inc. v. Deloney, 909 F. Supp. 2d 881 (E.D. Mich. 2012).

23 Thomas v. Chicago Park Dist., 534 U.S. 316, 122 S. Ct. 775, 151 L. Ed. 2d 783 (2002).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(11) Manner of Regulation, Restriction, or Infringement of Rights

§ 551. Noise regulations as affected by freedom of speech and press

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1509, 1510, 1840, 1841

A speaker using a bullhorn in a town square may voice objectionable ideas to passing members of the public who are seemingly a captive audience without offending the First Amendment.[1] However, under the rule that reasonable regulations as to the manner of exercise of protected speech are constitutionally permissible where they are necessary to further significant governmental interests and are nondiscriminatory,[2] the use of sound tracks or sound amplification devices such as loudspeakers, bull horns, and so forth, may be regulated or limited.[3] Indeed, while music is a form of protected speech, the government nonetheless has a substantial interest in protecting its citizens from unwelcome noise and may act to prevent such noise even in traditional public forums such as city streets and parks.[4] Similarly, loud shouting and cheering designed to disrupt rather than communicate may be prohibited generally, but a prohibition of all loud speech is not permissible.[5] Accordingly, the limited noise restrictions imposed by a state court injunction, restraining antiabortion protesters outside an abortion clinic from singing, chanting, whistling, shouting, yelling, using bullhorns, auto horns, or sound amplification equipment or making other sounds within earshot of the patients inside the clinic burdens no more speech than is necessary to ensure the health and well-being of patients at the clinic.[6] Likewise, a municipal noise regulation designed to ensure that musical performances at a public band shell do not disturb the surrounding residents is a "content-neutral" time, place, or manner regulation, which will be upheld as long as it is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels of communication.[7]

Observation:

For purposes of analysis under the overbreadth doctrine in the context of constitutional free speech protections, local governments maintain a legitimate interest in protecting residents from excessive and unwelcome noise; thus, a properly tailored ordinance prohibiting disturbing vehicle horn honking that is intended to annoy or harass would likely survive scrutiny.[8]

Footnotes

1 State v. Burkert, 231 N.J. 257, 174 A.3d 987 (2017).

2 § 534.

3 California v. LaRue, 409 U.S. 109, 93 S. Ct. 390, 34 L. Ed. 2d 342 (1972) (abrogated on other grounds by, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996)); U. S. Labor Party v. Codd, 527 F.2d 118 (2d Cir. 1975).

4 Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).

5 Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); In re Brown, 9 Cal. 3d 612, 108 Cal. Rptr. 465, 510 P.2d 1017 (1973).

6 Madsen v. Women's Health Center, Inc., 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994); Habiger v. City of Fargo, 80 F.3d 289 (8th Cir. 1996).

7 Ward v. Rock Against Racism, 491 U.S. 781, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989).

8 State v. Immelt, 173 Wash. 2d 1, 267 P.3d 305 (2011).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(11) Manner of Regulation, Restriction, or Infringement of Rights

§ 552. Taxation as affected by freedom of speech and press

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1509, 1510, 1572

A.L.R. Library

Cable Television Equipment or Services as Subject to Sales or Use Tax, 23 A.L.R.6th 165

The power to impose a tax on the exercise of free speech or press is as potent as a power of censorship, and such a tax restrains in advance the constitutional liberties and inevitably tends to suppress their exercise.[1] Thus, official scrutiny of the content of publications as a basis for imposing a tax is entirely incompatible with the First Amendment's guarantee of freedom of the press,[2] and absent a compelling justification, the government may not exercise its taxing power to single out the press.[3] However, a state has the power to enact statutes which impose taxes on all businesses, including the press, in order to generate revenue as long as those statutes operate evenhandedly on all similarly situated.[4]

While differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints, the fact that cable television is taxed differently from other media does not by itself raise any First Amendment concerns. A state's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting print media, does not violate the First Amendment. A tax generally applied to receipts from the sale of all tangible personal property and a broad range of services, unless within a group of specific exemptions is not unconstitutional, where there is no indication that the state targeted cable television in any purposeful attempt to interfere with its First Amendment activities, and where the sales tax is not content based.[5]

No free speech question is presented by an income tax regulation which denies taxpayers a deduction for expenditures made to promote or defeat legislation.[6]

Observation:

The Tax Injunction Act[7] bars a district court from exercising jurisdiction over an action in which the operators of newsstands seek a preliminary injunction against the enforcement of a city's plan to increase the occupancy charge for operating newsstands, on the basis that the increase was an impermissible tax on protected First Amendment activity, since the fact that the First Amendment is involved does not make the Act inapplicable, and despite certain "fee-like" attributes, the occupancy charge was a "tax" within the meaning of the Act.[8]

Footnotes

1 Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292, 146 A.L.R. 81 (1943).

2 Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991).

3 Leathers v. Medlock, 499 U.S. 439, 111 S. Ct. 1438, 113 L. Ed. 2d 494 (1991).

4 Am. Jur. 2d, Newspapers, Periodicals, and Press Associations § 30.

5 Leathers v. Medlock, 499 U.S. 439, 111 S. Ct. 1438, 113 L. Ed. 2d 494 (1991).

6 Cammarano v. U.S., 358 U.S. 498, 79 S. Ct. 524, 3 L. Ed. 2d 462 (1959).

7 28 U.S.C.A. § 1341.

8 Gasparo v. City of New York, 16 F. Supp. 2d 198 (E.D. N.Y. 1998).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

c. Freedom of Speech and Press

(11) Manner of Regulation, Restriction, or Infringement of Rights

§ 553. Other types or subjects of regulation as affected by freedom of speech and press

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1509, 1510

Among other types or subjects of regulation which have affected—most often, within permissible constitutional limits, but occasionally not—the First Amendment freedom of speech or of the press are—

— depriving convicted criminals of income derived from writing books or other publications about their crimes.[1]

— zoning regulations.[2]

— postal regulations.[3]

— regulation of the display of outdoor signs.[4]

— regulation of press coverage of judicial proceedings,[5] including presence at a trial and the use of cameras or broadcasting facilities.[6]

— regulation of press coverage of legislative proceedings.[7]

As a general matter, the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.[8] Official reprisal for protected speech offends the Constitution because it threatens to inhibit the exercise of the protected right.[9]

Observation:

A statute[10] prohibiting the misuse of symbols, emblems, or names in reference to Social Security is not unconstitutionally overbroad under the First Amendment, since the statutory prohibitions on commercial and noncommercial speech merely restricted the manner in which the words could be used, and to the extent that the statute regulated the manner in which a charity could solicit, it is constitutional because of the overriding governmental interest in protecting Social Security as the financial lifeline of the most senior Americans, and in protecting Social Security recipients from deceptive mailings.[11]

Footnotes

1 Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd., 502 U.S. 105, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991) (holding unconstitutional New York's "son of Sam" law, which required that the accused or convicted criminal's income from works describing his crime be deposited in an escrow account, which funds were then made available to victims of crime and the criminal's other creditors, the court saying that the law was presumptively inconsistent with the First Amendment; whether the First Amendment "speaker" is considered to be a criminal, an accused criminal, or a publisher, the law singles out speech on a particular subject for a financial burden that it places on no other speech and no other income).

2 City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986) (a zoning ordinance which prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school is a valid governmental response to the serious problems created by adult theaters and satisfies the dictates of the First Amendment); Pitt County v. Dejavue, Inc., 185 N.C. App. 545, 650 S.E.2d 12 (2007) (a zoning ordinance regulating sexually oriented businesses is content-neutral when it is unrelated to the suppression of free expression and its purpose is to eliminate undesirable secondary effects of the sexually oriented business).

3 U.S. v. Kokinda, 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990) (holding that a Postal Service regulation prohibiting solicitations on postal premises, as applied to members of a political advocacy group who were soliciting contributions, selling books and newspaper subscriptions, and distributing political literature on the sidewalk near the Post Office entrance, does not violate the free speech protections of the First Amendment).

An absolute prohibition against soliciting signatures on initiative petitions anywhere on postal property was not narrowly tailored under the First Amendment Free Speech Clause to advance the government's content-neutral goals of minimizing the disruption of postal business and providing unimpeded ingress and egress of customers and employees to and from post offices, since the ban necessarily barred much solicitation that was not disruptive and the United States Postal Service (USPS) already had accomplished those purposes through a myriad of other means. Initiative and Referendum Institute v. U.S. Postal Service, 417 F.3d 1299 (D.C. Cir. 2005).

4 Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) (holding that a town's sign code, which subjected ideological signs to certain restrictions, subjected political signs to greater restrictions, and subjected temporary directional signs relating to events to even greater restrictions, was content based on its face, and thus was subject to strict scrutiny in a free speech challenge by a church seeking to place temporary signs announcing its services, where any innocent motives on the part of the town did not eliminate the danger of censorship, the sign code singled out specific subject matter for differential treatment even if it did not target viewpoints within that subject matter, and the sign code singled out signs bearing a particular message, i.e., the time and location of a particular event).

5 Oklahoma Pub. Co. v. District Court In and For Oklahoma County, 430 U.S. 308, 97 S. Ct. 1045, 51 L. Ed. 2d 355 (1977); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976).

6 Generally, as to regulation of the presence of news media at trials, see Am. Jur. 2d, Trial §§ 145 to 149.

7 Sigma Delta Chi v. Speaker, Maryland House of Delegates, 270 Md. 1, 310 A.2d 156 (1973).

8 Hartman v. Moore, 547 U.S. 250, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006); Donahoe v. Arpaio, 986 F. Supp. 2d 1091 (D. Ariz. 2013).

In the First Amendment context, any form of official retaliation for exercising one's freedom of speech, including prosecution, threatened prosecution, bad faith investigation, and legal harassment, constitutes an infringement of that freedom. Mata v. Anderson, 685 F. Supp. 2d 1223 (D.N.M. 2010), aff'd, 635 F.3d 1250 (10th Cir. 2011).

9 Hartman v. Moore, 547 U.S. 250, 126 S. Ct. 1695, 164 L. Ed. 2d 441 (2006).

10 42 U.S.C.A. § 1320b-10.

11 United Seniors Ass'n, Inc. v. Social Sec. Admin., 423 F.3d 397 (4th Cir. 2005).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(1) In General

§ 554. Right to petition government for redress of grievances as Enabling Clause of First Amendment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1435

The First Amendment to the Federal Constitution provides that "Congress shall make no law … abridging … the right of the people peaceably to assemble and to petition the Government for a redress of grievances."[1] The rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights.[2] The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation with respect to public affairs and to petition for a redress of grievances.[3] In conjunction with the right of assembly, the right to petition is the Enabling Clause of the First Amendment, as the right to petition safeguards citizens' exercise of their other First Amendment rights, that is, their rights to free speech, press, and religion.[4]

Observation:

Although the First Amendment itself is merely a limitation against federal abridgment of the rights of assembly and to petition the government, the Due Process Clause of the 14th Amendment[5] prevents any denial of these rights by the states.[6]

Footnotes

1 U.S. Const. Amend. I.

2 United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967); Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945); LeBlanc-Sternberg v. Fletcher, 781 F. Supp. 261 (S.D. N.Y. 1991).

3 De Jonge v. State of Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937).

4 Krystkowiak v. W.O. Brisben Companies, Inc., 90 P.3d 859 (Colo. 2004).

5 U.S. Const. Amend. XIV, § 1.

6 §§ 414, 414.

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§ 555. Nature of right to assemble peaceably for purpose of petitioning government for redress of grievances

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1430, 1435

The right of the people to assemble for the purpose of petitioning for a redress of grievances or for anything else connected with the powers or the duties of the government is an attribute of citizenship.[1] It extends to all, irrespective of their race or ideology.[2] It is a right cognate to those of free speech and free press and is equally fundamental.[3]

The right of assembly guaranteed in the Federal Constitution to the people is not restricted to the literal right of meeting together "to petition the government for a redress of grievances."[4] Further, the grievances for redress of which the right of petition was ensured, and with it the right of assembly, are not solely religious or political ones.[5] Moreover, the rights under the First and 14th Amendments guaranteeing freedom of assembly and petition are not confined to verbal expression but also embrace appropriate types of action, including protest in a peaceable and orderly manner by silent and reproachful presence in a place where the protestant has every right to be.[6]

Observation:

The right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association, and petition.[7]

Footnotes

1 Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945).

2 Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

3 De Jonge v. State of Oregon, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937).

4 American Federation of Labor v. Reilly, 113 Colo. 90, 155 P.2d 145, 160 A.L.R. 873 (1944).

5 Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945); Bowe v. Secretary of the Com., 320 Mass. 230, 69 N.E.2d 115, 167 A.L.R. 1447 (1946).

6 Brown v. State of La., 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966).

7 Mothershed v. Justices of Supreme Court, 410 F.3d 602 (9th Cir. 2005), as amended on other grounds on denial of reh'g, (July 21, 2005) and opinion amended on other grounds on denial of reh'g, 2005 WL 1692466 (9th Cir. 2005).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(1) In General

§ 556. Restrictions on right to assemble peaceably for purpose of petitioning government for redress of grievances

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1430, 1435, 1436

Any content-based restriction on the right to petition the government must meet strict scrutiny under the First Amendment. Therefore, the restriction must be narrowly tailored and serve a compelling state interest.[1]

People who want to propagandize their protests or views have no constitutional right to do so whenever or wherever they please.[2] Not every parcel of publicly owned property is a suitable or available place for the exercise of the constitutional rights of citizens to assemble and petition their government or express grievances.[3]

Footnotes

1 Seum v. Osborne, 348 F. Supp. 3d 616 (E.D. Ky. 2018) (holding that a citizen advocate's ban from the third floor of the state capitol annex was a content-based restriction on his right to petition the government and to speech, and thus, was subject to strict scrutiny under the First Amendment, where the letter notifying the

advocate of the ban stated that it was in response to the "offensive comments" the advocate made in front of the staff of the legislative research committee).

While the constitutional right of petition is accorded a paramount and preferred place in the democratic system, reasonable narrowly drawn restrictions designed to prevent abuse of the right can be valid. Barri v. Workers' Comp. Appeals Bd., 28 Cal. App. 5th 428, 239 Cal. Rptr. 3d 180 (4th Dist. 2018).

Any impairment of the right to petition, including any penalty exacted after the fact, must be narrowly drawn. San Diego County Water Authority v. Metropolitan Water Dist. of Southern California, 12 Cal. App. 5th 1124, 220 Cal. Rptr. 3d 346 (1st Dist. 2017), as modified on other grounds on denial of reh'g, (July 18, 2017).

2 Greer v. Spock, 424 U.S. 828, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976); Adderley v. State of Fla., 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966).

As to restrictions on the right of assembly, generally, see § 560.

As to limitations on other fundamental constitutional rights, generally, see § 411.

As to reasonable regulations to preserve and protect the general welfare, generally, see § 397.

3 Knight v. Anderson, 480 F.2d 8 (9th Cir. 1973).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(1) In General

§ 557. Restrictions on right to assemble peaceably for purpose of petitioning government for redress of grievances—Loyalty oaths

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1430, 1435, 1436

The United States Supreme Court has held that the First Amendment right to assemble or petition applies to forbid a loyalty oath for teachers which has the effect of preventing their seeking to alter the form of government.[1] However, the court has also held that the freedom of assembly or of the right to petition is not violated by an ordinance requiring municipal employees to take an oath of nonadvocacy of, and nonaffiliation with any group advocating, the overthrow of the government.[2] State courts faced with the question of validity of loyalty oaths as against claims of violation of freedom of assembly have sustained them as applied to public officers and employees[3] and as to candidates for public office.[4]

Footnotes

1 Whitehill v. Elkins, 389 U.S. 54, 88 S. Ct. 184, 19 L. Ed. 2d 228 (1967).

2 Garner v. Board of Public Works of City of Los Angeles, 341 U.S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951) (the ordinance also required an affidavit concerning membership in the Communist Party).

3 Steiner v. Darby, 88 Cal. App. 2d 481, 199 P.2d 429 (2d Dist. 1948).

4 Shub v. Simpson, 75 A.2d 842 (Md. 1950), opinion supplemented, 196 Md. 177, 76 A.2d 332 (1950).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(2) Right to Assemble

(a) Scope of Right

§ 558. Scope of right to assemble, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1430

The First Amendment[1] prohibits the government from restraining or abridging the freedom of assembly.[2] It protects the rights of individuals to assemble with others for political or for social purposes.[3] Thus, parading and other forms of public assembly are explicitly protected by the First Amendment.[4]

Footnotes

1 U.S. Const. Amend. I.

2 Edmondson v. Shearer Lumber Products, 139 Idaho 172, 75 P.3d 733, 7 A.L.R.6th 841 (2003).

3 State v. J.P., 907 So. 2d 1101 (Fla. 2004).

4 People v. Barrett, 13 Misc. 3d 929, 821 N.Y.S.2d 416 (N.Y. City Crim. Ct. 2006).

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C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(2) Right to Assemble

(a) Scope of Right

§ 559. Where right to assembly may be exercised

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1430, 1431

Under the First Amendment, public streets and sidewalks may be used for public assembly and debate.[1] However, public schools do not, for First Amendment purposes, possess all the attributes of streets, parks, and other traditional public forums that have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.[2] A prison or jail is not a facility generally open to the public, so demonstrators there may properly be arrested and prosecuted for malicious trespass,[3] and clergy may properly be denied admission for the purpose of conducting religious services and offering religious counseling to prisoners,[4] without violation of the right to peaceably assemble.

The First and 14th Amendments safeguard the right of free assembly by limitations on governmental action, not on action by the owner of private property used nondiscriminatorily for private purposes only.[5] There is no right under the First Amendment for a person to use a privately owned shopping center as a forum to communicate without the permission of the property owner.[6]

Caution:

State constitutions may provide broader or more expansive speech rights with respect to private property than the Federal Constitution,[7] so long as such protection does not conflict with any federally protected property right of the owners.[8]

Footnotes

1 Saint John's Church in Wilderness v. Scott, 194 P.3d 475 (Colo. App. 2008).

2 Bannon v. School Dist. of Palm Beach County, 387 F.3d 1208, 193 Ed. Law Rep. 78 (11th Cir. 2004).

3 Adderley v. State of Fla., 385 U.S. 39, 87 S. Ct. 242, 17 L. Ed. 2d 149 (1966).

4 O'Malley v. Brierley, 477 F.2d 785 (3d Cir. 1973).
As to the petition rights of prisoners, see § 577.

5 Lloyd Corp., Limited v. Tanner, 407 U.S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972).

6 United Food and Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Associate, L.P., 270 Conn. 261, 852 A.2d 659 (2004).

7 PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980); Albertson's, Inc. v. Young, 107 Cal. App. 4th 106, 131 Cal. Rptr. 2d 721 (3d Dist. 2003); United Food and Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Associate, L.P., 270 Conn. 261, 852 A.2d 659 (2004).

8 PruneYard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L. Ed. 2d 741 (1980); United Food and Commercial Workers Union, Local 919, AFL-CIO v. Crystal Mall Associate, L.P., 270 Conn. 261, 852 A.2d 659 (2004).

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(2) Right to Assemble

(b) Restrictions

§ 560. Restrictions on right of assembly, generally

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 1430, 1431

Forms

Forms relating to denial of right of assembly, see Am. Jur. Pleading and Practice Forms, Constitutional Law [Westlaw®(r) Search Query]

Freedom of assembly is dependent upon the power of constitutional government to survive;[1] the First Amendment right to use public forums such as streets for speech and assembly is not absolute.[2] The right of free assembly, while fundamental in democratic society, does not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.[3] However, the power of the state to abridge freedom of assembly is the exception rather than the rule.[4]

Freedom of assembly is susceptible to restriction only to prevent grave and immediate danger to interests which the state may lawfully protect.[5] For example, the right of assembly may permissibly be restricted as a condition of parole.[6] Further, the right of the public authorities to prohibit gatherings or congregations of persons during the prevalence of an epidemic, and for such purpose to close or require the closing of public places or institutions, has frequently been recognized or assumed.[7]

CUMULATIVE SUPPLEMENT

Cases:

An order may regulate the secondary effects of speech and assembly, such as public health, without being held to regulate the expressive content of the speech or assembly at issue, in determining whether order is permissible restriction on speech or assembly under First Amendment. U.S. Const. Amend. 1. Desrosiers v. Governor, 486 Mass. 369, 158 N.E.3d 827 (2020).

[END OF SUPPLEMENT]

Footnotes

1 American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

2 United for Peace and Justice v. City of New York, 323 F.3d 175 (2d Cir. 2003).

3 Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183 (3d Cir. 2008).

4 Herndon v. Lowry, 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066 (1937).

5 Carroll v. President and Com'rs of Princess Anne, 393 U.S. 175, 89 S. Ct. 347, 21 L. Ed. 2d 325 (1968); Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943); In re Brown, 9 Cal. 3d 612, 108 Cal. Rptr. 465, 510 P.2d 1017 (1973).

6 Pazden v. New Jersey State Parole Bd., 374 N.J. Super. 356, 864 A.2d 1136 (App. Div. 2005).

7 Am. Jur. 2d, Health § 74.

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1. First Amendment Rights Guaranteed by Constitution

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(2) Right to Assemble

(b) Restrictions

§ 561. Reasonableness, as to time, place, and manner, of restrictions on right of assembly

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1430, 1431

Restrictions on exercise of the constitutional guarantees of assembly must be reasonable as to time, place, and manner.[1] Access to the streets, sidewalks, parks, and other similar public places for the purpose of exercising First Amendment rights cannot constitutionally be denied broadly.[2] However, a government regulation of assemblies that is narrowly tailored to serve a significant government interest may not be unconstitutional.[3]

Observation:

The overbreadth doctrine[4] serves to invalidate legislation so sweeping that along with its allowable proscriptions, it restricts the constitutionally protected right of assembly.[5]

When determining if a government regulation of assembly or speech is unconstitutional, the requirement that a time, place, and manner regulation be narrowly tailored to serve a significant government interest is met when the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.[6] On the other hand, a regulation that authorizes the punishment of constitutionally protected conduct and that subjects the exercise of the right of assembly to an unascertainable standard violates the right of free assembly.[7]

Footnotes

1 Democracy Coalition v. City of Austin, 141 S.W.3d 282 (Tex. App. Austin 2004).
A municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes. Hudgens v. N. L. R. B., 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976).

2 Grayned v. City of Rockford, 408 U.S. 104, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).
As to regulation of the use of streets, highways, or parks for public assemblies, meetings, or parades, generally, see § 547.

3 Sauk County v. Gumz, 2003 WI App 165, 266 Wis. 2d 758, 669 N.W.2d 509 (Ct. App. 2003).

4 § 421.

5 Hyshaw v. State, 893 So. 2d 1239 (Ala. Crim. App. 2003).

6 Sauk County v. Gumz, 2003 WI App 165, 266 Wis. 2d 758, 669 N.W.2d 509 (Ct. App. 2003).

7 Coates v. City of Cincinnati, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971).
As to viewpoint or content-based regulations, see § 469.

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(b) Restrictions

§ 562. Violent assemblies as not enjoying First Amendment protection

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1430, 1431

Government officials may stop or disperse public demonstrations or protests, without violating the First Amendment right of freedom of assembly, where there appears a clear and present danger of:[1]

• riot

• disorder

• interference with traffic upon the public streets

• other immediate threat to public safety, peace, or order

In other words, violent assemblies and demonstrations do not enjoy First Amendment protection.[2] However, neither energetic, even raucous, protesters who annoy or anger audiences nor demonstrations that slow traffic or inconvenience pedestrians justify the police stopping or interrupting a public protest without violating the protesters' First Amendment freedoms of assembly.[3]

Footnotes

1 Jones v. Parmley, 465 F.3d 46 (2d Cir. 2006).
As to the "clear and present danger" test in cases involving freedom of expression, see § 515.

2 Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977).
A statute prohibiting assembling of three or more persons in a violent manner to do an unlawful act or to disturb others does not violate the freedom of assembly. State v. Elliston, 159 N.W.2d 503 (Iowa 1968).

3 Jones v. Parmley, 465 F.3d 46 (2d Cir. 2006).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

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(2) Right to Assemble

(b) Restrictions

§ 563. Right of assembly as affected by criminal statutes

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1430, 1431

The Supreme Court, in reviewing criminal cases, has taken a liberal view of the right of the people to assemble and to protest publicly wrongs done them, relying heavily on the First Amendment right to petition the government for a redress of grievances, in conjunction with other First Amendment rights.[1] A state may not make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people.[2]

However, statutes defining the offense of disturbing meetings, at first aimed solely at the protection of religious meetings, have gradually been extended to the protection of all lawful meetings, gatherings, and processions.[3] Such statutes have been held to withstand various constitutional challenges.[4] Similarly, statutes punishing unlawful assemblies or the aiding and abetting of such assemblies usually are held to be constitutional, unless they delegate enforcement authority without laying down any rules or standards properly within the police power or grant local authorities absolute discretion in preventing the gathering or congregation of persons.[5] Statutes or ordinances regulating breach of the peace and disorderly conduct sometimes raise questions of violation of constitutionally protected rights of freedom of assembly.[6] Similarly, criminal trespass statutes may affect the First Amendment right to freedom of assembly.[7]

Footnotes

1 Gregory v. City of Chicago, 394 U.S. 111, 89 S. Ct. 946, 22 L. Ed. 2d 134 (1969); Brown v. State of La., 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637 (1966); Edwards v. South Carolina, 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697 (1963).

2 Coates v. City of Cincinnati, 402 U.S. 611, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971).

3 Am. Jur. 2d, Disturbing Meetings § 1.

4 Am. Jur. 2d, Disturbing Meetings § 2.

5 Am. Jur. 2d, Mobs and Riots § 7.

6 Am. Jur. 2d, Breach of Peace and Disorderly Conduct §§ 14, 33, 34, 42.

7 Am. Jur. 2d, Trespass § 141.

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C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

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(2) Right to Assemble

(b) Restrictions

§ 564. Right of assembly as affected by statute or regulation prohibiting picketing

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West's Key Number Digest

West's Key Number Digest, Constitutional Law 1430, 1431

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Validity, Construction, and Operation of Statute or Regulation Forbidding, Regulating, or Limiting Peaceful Residential Picketing, 113 A.L.R.5th 1

As a general matter, peaceful picketing is an expressive activity protected by the First Amendment.[1] However, a precise, narrowly drawn statute prohibiting picketing and parading in or near a courthouse is a proper and constitutional regulation of the right of free assembly necessitated by the state's interest in protecting the judicial process.[2] Although the United States Supreme Court has found that a municipal ordinance banning targeted picketing at a single residence may satisfy constitutional scrutiny,[3] the First Amendment protects the right to engage in peaceful targeted residential picketing in the absence of such a regulation.[4]

Footnotes

1 U.S. v. Grace, 461 U.S. 171, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983); Dean v. Byerley, 354 F.3d 540, 2004 FED App. 0008P (6th Cir. 2004).

2 Cox v. State of La., 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965).

3 Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988).

4 Dean v. Byerley, 354 F.3d 540, 2004 FED App. 0008P (6th Cir. 2004).

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16A Am. Jur. 2d Constitutional Law § 565

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(2) Right to Assemble

(b) Restrictions

§ 565. Right of assembly as affected by permit requirement

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1430, 1431

A.L.R. Library

Validity, construction, and application of state or local enactments regulating parades, 80 A.L.R.5th 255

A regulation requiring a permit for processions or parades does not violate the right of free assembly where it is determined to be a reasonable regulation for legitimate traffic considerations.[1] The government may regulate, through the imposition of a permit requirement, the time, place, and manner of demonstrative public events.[2]

On the other hand, the courts will strike down regulations requiring permits where they constitute an arbitrary and unreasonable prior restraint upon the right of free assembly.[3] Precautionary censorship is equally objectionable whether imposed by a statute making criminal the assembly of persons or organizations whose objects and affiliations are disapproved, or by a statute requiring

an administrative board to deny necessary permits for such meetings.[4] The fact that citizens have been annoyed by addresses made in city parks and public grounds does not warrant interference with the rights of free expression and assembly by an ordinance prohibiting such addresses except by permission of the city manager.[5]

Footnotes

1 District of Columbia v. Edgcomb, 305 A.2d 506 (D.C. 1973).
As to regulation of the use of streets or highways for parades, generally, see Am. Jur. 2d, Highways, Streets, and Bridges § 205.
As to the use of parks, squares, or commons, generally, see Am. Jur. 2d, Parks, Squares, and Playgrounds § 22.

2 Transportation Alternatives, Inc. v. City of New York, 340 F.3d 72 (2d Cir. 2003).

3 Collin v. Chicago Park Dist., 460 F.2d 746 (7th Cir. 1972); York v. City of Danville, 207 Va. 665, 152 S.E.2d 259 (1967).

4 Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946).

5 In re Whitney, 57 Cal. App. 2d 167, 134 P.2d 516 (3d Dist. 1943).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(3) Right to Petition

(a) Scope of Right

§ 566. Scope of right to petition, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1435

The right to petition the government for redress of grievances is protected by the First Amendment[1] to the United States Constitution.[2] The right to petition, in conjunction with the right of assembly, has been described as the Enabling Clause of the First Amendment,[3] as the right to petition safeguards citizens' exercise of their other First Amendment rights to free speech and press.[4]

The right to petition is cut from the same cloth as the other guarantees of the First Amendment and is an assurance of a particular freedom of expression.[5] It was inspired by the same ideals of liberty and democracy that resulted in the First Amendment freedoms to speak, publish, and assemble.[6] Indeed, the right to petition the government for a redress of grievances has been recognized as one of the most precious of the liberties safeguarded by the Bill of Rights,[7] and speech implicating such right is high in the hierarchy of First Amendment values.[8] The right to petition is closely related to other First Amendment rights; the right to petition allows citizens to express their ideas, hopes, and concerns to their government and their elected representatives, whereas the right to speak fosters the public exchange of ideas that is integral to deliberative democracy as well as to the whole

realm of ideas and human affairs.[9] Indeed, the First Amendment right to speech and petition are inseparable, and generally there is no sound basis for granting greater constitutional protection to one over the other.[10]

Observation:

The state constitutional right to petition for redress of grievances is the right to complain about and complain to the government.[11]

The right to petition extends to all departments of the government,[12] including cities and their legislative bodies.[13] Further, endeavors by lobbyists and others to persuade elected officials of the wisdom or error of policy proposals are protected by the right to petition the government for a redress of grievances guaranteed by the First Amendment.[14]

Observation:

The First Amendment right to petition one's government extends equally to corporate citizens as it does to private citizens.[15]

Footnotes

1 U.S. Const. Amend. I.

2 People ex rel. Gallegos v. Pacific Lumber Co., 158 Cal. App. 4th 950, 70 Cal. Rptr. 3d 501 (1st Dist. 2008), as modified on other grounds, (Feb. 1, 2008); State v. Alphonse, 147 Wash. App. 891, 197 P.3d 1211 (Div. 1 2008).
Statutorily authorized petitions are protected by the First Amendment. Campbell v. Pennsylvania School Boards Association, 336 F. Supp. 3d 482, 360 Ed. Law Rep. 725 (E.D. Pa. 2018).

3 § 554.

4 Krystkowiak v. W.O. Brisben Companies, Inc., 90 P.3d 859 (Colo. 2004).

5 McDonald v. Smith, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384, 17 Fed. R. Evid. Serv. 1041 (1985).

6 McDonald v. Smith, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384, 17 Fed. R. Evid. Serv. 1041 (1985).

7 Lozman v. City of Riviera Beach, Fla., 138 S. Ct. 1945, 201 L. Ed. 2d 342 (2018); Calzone v. Summers, 942 F.3d 415 (8th Cir. 2019); DeMartini v. Town of Gulf Stream, 942 F.3d 1277 (11th Cir. 2019); Balboa Island Village Inn, Inc. v. Lemen, 40 Cal. 4th 1141, 57 Cal. Rptr. 3d 320, 156 P.3d 339 (2007), as modified on other grounds, (Apr. 26, 2007).

8 Lozman v. City of Riviera Beach, Fla., 138 S. Ct. 1945, 201 L. Ed. 2d 342 (2018); DeMartini v. Town of Gulf Stream, 942 F.3d 1277 (11th Cir. 2019).

9 Gerawan Farming, Inc. v. Agricultural Labor Relations Bd., 23 Cal. App. 5th 1129, 234 Cal. Rptr. 3d 88 (5th Dist. 2018), review filed, (July 9, 2018) and review denied, (Sept. 12, 2018).

Traditional-American constitutional rights to petition the government for a redress of grievances and to free speech involve personal expression and citizen participation in government. Gresk for Estate of VanWinkle v. Demetris, 96 N.E.3d 564 (Ind. 2018).

10 Knight First Amendment Institute at Columbia University v. Trump, 302 F. Supp. 3d 541 (S.D. N.Y. 2018), aff'd, 928 F.3d 226 (2d Cir. 2019).

11 Chorn v. Workers' Comp. Appeals Bd., 245 Cal. App. 4th 1370, 200 Cal. Rptr. 3d 74 (2d Dist. 2016), as modified on other grounds on denial of reh'g, (Apr. 20, 2016).

12 BE & K Const. Co. v. N.L.R.B., 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008); In re Marriage of Meredith, 148 Wash. App. 887, 201 P.3d 1056 (Div. 2 2009); Eichenseer v. Madison-Dane County Tavern League, Inc., 2008 WI 38, 308 Wis. 2d 684, 748 N.W.2d 154 (2008).

The state constitutional right to petition includes the right to petition the executive or legislative branches directly. Chorn v. Workers' Comp. Appeals Bd., 245 Cal. App. 4th 1370, 200 Cal. Rptr. 3d 74 (2d Dist. 2016), as modified on other grounds on denial of reh'g, (Apr. 20, 2016).

13 Eichenseer v. Madison-Dane County Tavern League, Inc., 2008 WI 38, 308 Wis. 2d 684, 748 N.W.2d 154 (2008).

14 U.S. v. Kincaid-Chauncey, 556 F.3d 923, 78 Fed. R. Evid. Serv. 1185 (9th Cir. 2009).

15 In re GlaxoSmithKline plc, 713 N.W.2d 48 (Minn. Ct. App. 2006), aff'd in part, rev'd in part on other grounds, 732 N.W.2d 257 (Minn. 2007).

The First Amendment protects the right of corporations to petition legislative and administrative bodies. Citizens United v. Federal Election Com'n, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(3) Right to Petition

(a) Scope of Right

§ 567. Right to petition courts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1435

The First Amendment freedom to petition protects an individual's right to petition the courts.[1] It protects an individual's right of access to the courts[2] and applies to litigation in particular.[3] The right to petition extends to all departments of the government under the *Noerr-Pennington* Doctrine,[4] and the right of access to the courts is but one aspect of the right of petition.[5]

Observation:

Just as a plaintiff invokes the right of petition by filing a lawsuit, a defendant, when responding to such an action, exercises the same constitutional right.[6]

Caution:

An attorney does not lack the First Amendment right to petition through pro se litigation simply because he or she is doing so in the capacity of representing himself or herself.[7]

While the right of individuals to pursue legal redress for claims having a reasonable basis in law or fact is protected by the First Amendment right to petition,[8] the right to petition the courts[9] or file lawsuits[10] is not absolute. The First Amendment right to petition does not protect, immunize, or guarantee—

— baseless litigation.[11]

— litigation that does not involve a bona fide grievance.[12]

— sham litigation.[13]

— the right to commit libel with impunity.[14]

— the right to clog the court system and impair everyone else's right to seek justice.[15]

Further, the First Amendment does not preclude the imposition of sanctions for the inclusion of groundless allegations in a legal pleading.[16] Nor is the right to petition the government violated by a statute that provides a complete defense to a cause of action or curtails a category of causes of action.[17]

CUMULATIVE SUPPLEMENT

Cases:

Trial court's award of attorney fees to city as prevailing party in receivership action to abate safety hazards on property owned by defendant property owner did not create an unconstitutional burden on property owner's First Amendment right to access and petition the courts; property owner did not challenge the legislature's authority to legislate on the subject of attorney fees, and the statute that allowed for attorney fees where a property owner failed to abate a public nuisance after a reasonable opportunity to do so served to further important public policies unrelated to the suppression of free expression, and was narrowly tailored to achieve the purpose of encouraging enforcement of important public rights by making the litigation financially feasible to the successful party. U.S. Const. Amend. 1; Cal. Civ. Proc. Code § 1021.5; Cal. Health & Safety Code § 17980.7(c)(11). City of Norco v. Mugar, 59 Cal. App. 5th 786, 274 Cal. Rptr. 3d 72 (4th Dist. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Dixon v. International Broth. of Police Officers, 504 F.3d 73 (1st Cir. 2007); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008); Woodruff v. Mason, 542 F.3d 545 (7th Cir. 2008); Johnson v. County of Hennepin, 915 N.W.2d 889 (Minn. 2018); Eichenseer v. Madison-Dane County Tavern League, Inc., 2008 WI 38, 308 Wis. 2d 684, 748 N.W.2d 154 (2008).
All citizens have the constitutional right to petition the courts to adjudicate honest disputes. Jourdan River Estates, LLC v. Favre, 278 So. 3d 1135 (Miss. 2019).
The right to petition the government for the redress of grievances includes the right to seek judicial relief. San Diego County Water Authority v. Metropolitan Water Dist. of Southern California, 12 Cal. App. 5th 1124, 220 Cal. Rptr. 3d 346 (1st Dist. 2017), as modified on other grounds on denial of reh'g, (July 18, 2017).
The state constitutional right to petition includes the right to petition the judicial branch for resolution of legal disputes. Chorn v. Workers' Comp. Appeals Bd., 245 Cal. App. 4th 1370, 200 Cal. Rptr. 3d 74 (2d Dist. 2016), as modified on other grounds on denial of reh'g, (Apr. 20, 2016).
As to the guarantee of free justice and open courts, generally, see §§ 666 to 671.

2 Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 131 S. Ct. 2488, 180 L. Ed. 2d 408 (2011); BE & K Const. Co. v. N.L.R.B., 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002); Doherty v. Merck & Co., Inc., 892 F.3d 493 (1st Cir. 2018); Collins v. Daniels, 916 F.3d 1302, 102 Fed. R. Serv. 3d 1145 (10th Cir. 2019), cert. denied, 140 S. Ct. 203, 205 L. Ed. 2d 123 (2019); DeMartini v. Town of Gulf Stream, 942 F.3d 1277 (11th Cir. 2019); Mejia v. City of Los Angeles, 156 Cal. App. 4th 151, 67 Cal. Rptr. 3d 228 (2d Dist. 2007); People v. Richardson, 181 P.3d 340 (Colo. App. 2007).
Within the constitutional right to petition is also found the right to access courts to seek redress for claimed injuries. Gaudette v. Davis, 2017 ME 86, 160 A.3d 1190 (Me. 2017).
The right of access to the courts arises from the First Amendment right to petition the government for redress of grievances. Grinzi v. San Diego Hospice Corp., 120 Cal. App. 4th 72, 14 Cal. Rptr. 3d 893 (4th Dist. 2004).

3 Woodruff v. Mason, 542 F.3d 545 (7th Cir. 2008).
The right to petition includes the act of filing litigation. Beach v. Harco National Ins. Co., 110 Cal. App. 4th 82, 1 Cal. Rptr. 3d 454 (3d Dist. 2003), as modified on other grounds, (June 30, 2003) and as modified on denial of reh'g, (July 29, 2003).

4 § 574.

5 California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972).

6 Beach v. Harco National Ins. Co., 110 Cal. App. 4th 82, 1 Cal. Rptr. 3d 454 (3d Dist. 2003), as modified on other grounds, (June 30, 2003) and as modified on other grounds on denial of reh'g, (July 29, 2003).
Just as a citizen may have the right to sue the government, the government likewise has the right, and duty, to engage in legitimate responsive litigation to defend itself against such challenges. DeMartini v. Town of Gulf Stream, 942 F.3d 1277 (11th Cir. 2019).

7 In re Foster, 253 P.3d 1244 (Colo. 2011).

8 Snyder v. Nolen, 380 F.3d 279 (7th Cir. 2004).

9 Dixon v. International Broth. of Police Officers, 504 F.3d 73 (1st Cir. 2007).

10 Rosado-Quinones v. Toledo, 528 F.3d 1 (1st Cir. 2008).

11 Chen v. Holder, 607 F.3d 511 (7th Cir. 2010); Wolfe v. George, 486 F.3d 1120 (9th Cir. 2007); Rental Housing Assn. of Northern Alameda County v. City of Oakland, 171 Cal. App. 4th 741, 90 Cal. Rptr. 3d 181 (1st Dist. 2009); Matter of Cottingham, 191 Wash. 2d 450, 423 P.3d 818 (2018), as corrected on other grounds, (Aug. 17, 2018) and as amended on other grounds, (Oct. 10, 2018) and cert. denied, 139 S. Ct. 925, 202 L. Ed. 2d 646 (2019).

12 Reid v. Dalton, 124 Wash. App. 113, 100 P.3d 349 (Div. 3 2004).

13 Greer-Burger v. Temesi, 116 Ohio St. 3d 324, 2007-Ohio-6442, 879 N.E.2d 174 (2007).

14 Clark v. Jenkins, 248 S.W.3d 418 (Tex. App. Amarillo 2008).

15 Chorn v. Workers' Comp. Appeals Bd., 245 Cal. App. 4th 1370, 200 Cal. Rptr. 3d 74 (2d Dist. 2016), as modified on other grounds on denial of reh'g, (Apr. 20, 2016).

16 Hale v. Scott, 371 F.3d 917 (7th Cir. 2004).

17 City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(3) Right to Petition

(a) Scope of Right

§ 568. Right to petition courts—Retaliation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1436

Every citizen has the constitutional right to seek redress in the courts without fear that recourse to the law will make that citizen a target for retaliation;[1] the First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech.[2] Thus, seeking to avail oneself of judicial remedies is constitutionally protected for the purpose of a First Amendment retaliation claim.[3]

Practice Tip:

To succeed on a First Amendment retaliation claim against a nonemployer, a plaintiff must prove (1) he or she was engaged in constitutionally protected activity, (2) the defendant's actions caused him or her to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity, and (3) the defendant's actions were substantially motivated to respond to his or her exercise of the constitutionally protected activity.[4]

Caution:

As with First Amendment retaliation claims under 42 U.S.C.A. § 1983 arising in the criminal prosecution and arrest context, the presence of probable cause will generally defeat a § 1983 First Amendment retaliation claim based on a civil lawsuit as a matter of law.[5]

CUMULATIVE SUPPLEMENT

Cases:

A plaintiff claiming First Amendment retaliation cannot rely on another plaintiff's injury in support of its own claim to show it engaged in protected activity. U.S. Const. Amend. 1. 145 Fisk, LLC v. Nicklas, 986 F.3d 759 (7th Cir. 2021).

[END OF SUPPLEMENT]

Footnotes

1 Powell v. Alexander, 391 F.3d 1 (1st Cir. 2004).
As to retaliation against prisoners, see § 577.

2 Lozman v. City of Riviera Beach, Fla., 138 S. Ct. 1945, 201 L. Ed. 2d 342 (2018).

3 Centro Medico del Turabo, Inc. v. Feliciano de Melecio, 406 F.3d 1 (1st Cir. 2005).

4 Brown v. Eppler, 794 F. Supp. 2d 1238 (N.D. Okla. 2011).

5 DeMartini v. Town of Gulf Stream, 942 F.3d 1277 (11th Cir. 2019).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(3) Right to Petition

(a) Scope of Right

§ 569. Filing criminal complaint or seeking administrative action as exercise of right to petition

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1435

An exercise of the First Amendment right to petition the government for the redress of grievances includes filing a criminal complaint with law enforcement officials.[1] It also includes seeking administrative action[2] or relief,[3] as well as petitioning administrative agencies.[4]

Footnotes

1 Meyer v. Board of County Com'rs of Harper County, Okla., 482 F.3d 1232 (10th Cir. 2007); Jackson v. New York State, 381 F. Supp. 2d 80 (N.D. N.Y. 2005).
Included in the First Amendment right to petition the government for a redress of grievances is the entitlement to petition law enforcement officials. Hobart v. Ferebee, 2004 SD 138, 692 N.W.2d 509 (S.D. 2004).

2 Beach v. Harco National Ins. Co., 110 Cal. App. 4th 82, 1 Cal. Rptr. 3d 454 (3d Dist. 2003), as modified on other grounds, (June 30, 2003) and as modified on other grounds on denial of reh'g, (July 29, 2003).

3 Jackson v. New York State, 381 F. Supp. 2d 80 (N.D. N.Y. 2005).

4 Hobart v. Ferebee, 2004 SD 138, 692 N.W.2d 509 (S.D. 2004); Eichenseer v. Madison-Dane County Tavern League, Inc., 2008 WI 38, 308 Wis. 2d 684, 748 N.W.2d 154 (2008).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(3) Right to Petition

(a) Scope of Right

§ 570. Right to receive response from government as not arising from exercise of right to petition

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1435

The First Amendment right to petition the government confers no attendant right to receive a response from the government.[1] Nor does it require official consideration of a petition[2] for redress of grievances.[3]

Footnotes

1 Trentadue v. Integrity Committee, 501 F.3d 1215 (10th Cir. 2007); We the People Foundation, Inc. v. U.S., 485 F.3d 140 (D.C. Cir. 2007); Schulz v. Town Board of Town of Queensbury, 178 A.D.3d 85, 111 N.Y.S.3d 732 (3d Dep't 2019), appeal dismissed, 2020 WL 1429941 (N.Y. 2020).
The First Amendment right to petition the government does not require that a government official respond to the grievance. Jones v. Brown, 300 F. Supp. 2d 674 (N.D. Ind. 2003).

2 We the People Foundation, Inc. v. U.S., 485 F.3d 140 (D.C. Cir. 2007); Schulz v. Town Board of Town of Queensbury, 178 A.D.3d 85, 111 N.Y.S.3d 732 (3d Dep't 2019), appeal dismissed, 2020 WL 1429941 (N.Y. 2020).

3 Schulz v. Town Board of Town of Queensbury, 178 A.D.3d 85, 111 N.Y.S.3d 732 (3d Dep't 2019), appeal dismissed, 2020 WL 1429941 (N.Y. 2020).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(3) Right to Petition

(a) Scope of Right

§ 571. Motive in seeking redress by exercising right to petition

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1435

The First Amendment right to petition the government does not hinge on an individual's motivation. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.[1] A private citizen exercises a constitutionally protected First Amendment right anytime he or she petitions the government for redress. The Petitioning Clause of the First Amendment does not pick and choose its causes, and the right of a private citizen to seek the redress of grievances is not limited to matters of public concern.[2]

On the other hand, the First Amendment does not protect petitions predicated on fraud or deliberate misrepresentation.[3] Nor will the First Amendment protect petitioning activity that is a sham, undertaken to harass an opponent rather than obtain relief from the government.[4] The First Amendment's Petition Clause does not provide absolute immunity to a defendant who is charged with expressing libelous and damaging falsehoods in letters to the President of the United States regarding a candidate for public office.[5] Further, one may be held criminally accountable for the degrading, abusive language one chooses to use in the exercise of one's right to voice a grievance to a public official.[6]

Footnotes

1 Hobart v. Ferebee, 2004 SD 138, 692 N.W.2d 509 (S.D. 2004).

2 Van Deelen v. Johnson, 497 F.3d 1151 (10th Cir. 2007).
As to petitions by public employees, see § 576.

3 U.S. v. Philip Morris USA Inc., 566 F.3d 1095, 73 Fed. R. Serv. 3d 896 (D.C. Cir. 2009).

4 Krystkowiak v. W.O. Brisben Companies, Inc., 90 P.3d 859 (Colo. 2004).

5 McDonald v. Smith, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384, 17 Fed. R. Evid. Serv. 1041 (1985).

6 State v. Alphonse, 142 Wash. App. 417, 174 P.3d 684 (Div. 1 2008).

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16A Am. Jur. 2d Constitutional Law § 572

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(3) Right to Petition

(b) Restrictions

§ 572. Restrictions on exercise of right to petition, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1435

Because the petition clause was inspired by the same ideals of liberty and democracy that resulted in the First Amendment freedoms to speak, publish, and assemble, it has been stated that there is no sound basis for granting greater constitutional protection to statements made in a petition than other First Amendment expressions.[1] The right to petition is no more sacred than the right of free speech, and as there may be an abuse of the right of free speech, so may there be an abuse of the right to petition.[2]

However, any impairment of the constitutional right to petition the government for redress of grievance must be narrowly drawn.[3] Although the right to free speech and the right to petition are separate guarantees, they are related[4] and generally subject to the same constitutional analysis.[5]

Observation:

Public school authorities must be given great leeway to regulate and restrict petitioning in elementary schools.[6]

Caution:

Neither the federal nor the state constitutional right of petition encompass a right to file a false crime report. Indeed, if the right of petition encompasses a right to file a false criminal report, then laws criminalizing such reports would be inherently unconstitutional.[7]

Footnotes

1 McDonald v. Smith, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384, 17 Fed. R. Evid. Serv. 1041 (1985).

2 In re Stolen, 193 Wis. 602, 216 N.W. 127, 55 A.L.R. 1355 (1927) (on rehearing).

3 In re R.H., 170 Cal. App. 4th 678, 88 Cal. Rptr. 3d 650, 45 A.L.R.6th 823 (5th Dist. 2009) (disapproved of on other grounds by, John v. Superior Court, 63 Cal. 4th 91, 201 Cal. Rptr. 3d 459, 369 P.3d 238 (2016)).

4 In re Marriage of Meredith, 148 Wash. App. 887, 201 P.3d 1056 (Div. 2 2009).

5 Campbell v. PMI Food Equipment Group, Inc., 509 F.3d 776 (6th Cir. 2007); Gunter v. Morrison, 497 F.3d 868 (8th Cir. 2007); Mejia v. City of Los Angeles, 156 Cal. App. 4th 151, 67 Cal. Rptr. 3d 228 (2d Dist. 2007). As to general limitations on the right of free speech, see § 513.

6 Walker-Serrano ex rel. Walker v. Leonard, 325 F.3d 412, 175 Ed. Law Rep. 93 (3d Cir. 2003).

7 Lefebvre v. Lefebvre, 199 Cal. App. 4th 696, 131 Cal. Rptr. 3d 171 (2d Dist. 2011).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(3) Right to Petition

(b) Restrictions

§ 573. Prohibiting payment of circulators of initiative or referendum petitions for purposes of First Amendment right to petition

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1435

A.L.R. Library

Validity, Construction, and Application of State Statutes Regulating or Proscribing Payment in Connection with Gathering Signatures on Nominating Petitions for Public Office or Initiative Petitions, 40 A.L.R.6th 317

The circulation of a petition to amend a state's constitution involves "core political speech," for which the First Amendment protection is at its zenith. A state law prohibiting the payment of circulators of initiative or referendum petitions is unconstitutional, notwithstanding the freedom of the proponents of an initiative petition to employ a means other than paid circulators to disseminate their ideas.[1]

CUMULATIVE SUPPLEMENT

Cases:

Statutory checkbox requirement, which required those circulating initiative or referendum petition to indicate whether circulator was paid or volunteer signature gatherer, was not narrowly tailored to serve overriding state interest, and thus requirement violated First Amendment right to free speech; requirement had potential to subject circulators to heat of the moment harassment, requirement failed to protect circulator's privacy regarding their status as either paid or volunteer circulator as well as sponsors right to have circulators engage in discourse with voters, and any potential signer who sought to determine circulator's paid or volunteer status could simply ask circulator. U.S. Const. Amend. 1; Mich. Const. art. 2, § 9; Mich. Comp. Laws Ann. § 168.482(7). League of Women Voters of Michigan v. Secretary of State, 331 Mich. App. 156, 952 N.W.2d 491 (2020), oral argument scheduled on application for leave to appeal, 505 Mich. 988, 938 N.W.2d 244 (2020) and aff'd in part, vacated in part, 2020 WL 7765755 (Mich. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(3) Right to Petition

(c) *Noerr-Pennington* Doctrine

§ 574. Immunity from statutory liability for petitioning any department of government for redress, generally; *Noerr-Pennington* doctrine

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1437(1), 1437(2)

A.L.R. Library

Validity, Construction, and Application of State and Municipal Enactments Regulating Lobbying and of Lobbying Contracts, 35 A.L.R.6th 1

Under what has become known as the *Noerr-*[1] *Pennington*[2] doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct,[3] including litigation[4] and lobbying.[5] The *Noerr-Pennington* doctrine is based on,[6] derives from,[7] and implements[8] the Petition Clause of the First Amendment. It applies to private parties connected to the petition and their agents[9] as well as municipal petitioners.[10]

Observation:

Conduct incidental to a First Amendment-protected petition is protected by the *Noerr-Pennington* doctrine if the petition itself is protected.[11]

Practice Tip:

The *Noerr-Pennington* doctrine must be asserted as an affirmative defense.[12]

The *Noerr-Pennington* doctrine allows businesses to combine and lobby to influence the legislative, executive, or judicial branches of government or administrative agencies without antitrust or civil rights liability because the First Amendment's right of petition protects such activities.[13] The motives of persons petitioning the government for governmental action favorable to them are irrelevant under *Noerr-Pennington* doctrine.[14] Indeed, the First Amendment's freedom to petition confers antitrust immunity from a concerted effort to influence public officials regardless of intent or purpose.[15]

Although the *Noerr-Pennington* doctrine arises in the antitrust context, the doctrine applies to cases outside the antitrust field, including Racketeer Influenced and Corrupt Organizations Act (RICO) cases.[16]

Observation:

Whether conduct constitutes protected First Amendment petitioning activity, under the *Noerr-Pennington* doctrine which protects employer conduct from liability under the National Labor Relations Act (NLRA) when it is part of a direct petition to the government, depends not only on its impact, but also on the context and nature of the activity.[17]

Footnotes

1 Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961).

2 United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965).

3 IGEN Intern., Inc. v. Roche Diagnostics GmbH, 335 F.3d 303 (4th Cir. 2003); Kearney v. Foley & Lardner, LLP, 566 F.3d 826 (9th Cir. 2009), opinion amended and superseded on other grounds on denial of reh'g, 582 F.3d 896 (9th Cir. 2009), opinion amended and superseded on other grounds on denial of reh'g, 590 F.3d 638 (9th Cir. 2009); Blinkoff v. O and G Industries, Inc., 113 Conn. App. 1, 965 A.2d 556 (2009); Penllyn Greene Associates, L.P. v. Clouser, 890 A.2d 424 (Pa. Commw. Ct. 2005); Anderson Development Co. v. Tobias, 2005 UT 36, 116 P.3d 323 (Utah 2005).

The *Noerr-Pennington* doctrine provides immunity from both federal and state statutory and common-law liability. Cisco Systems, Inc. v. Beccela's Etc., LLC, 403 F. Supp. 3d 813 (N.D. Cal. 2019).

The *Noerr-Pennington* doctrine does not to operate as a privilege, but rather as an immunity bar from suit for claims based on the actions or communications of those petitioning the government. Jourdan River Estates, LLC v. Favre, 278 So. 3d 1135 (Miss. 2019).

4 IGEN Intern., Inc. v. Roche Diagnostics GmbH, 335 F.3d 303 (4th Cir. 2003); New West, L.P. v. City of Joliet, 491 F.3d 717 (7th Cir. 2007).

Immunity from liability for claims related to litigation conduct, under the *Noerr-Pennington* doctrine, extends to conduct incidental to a lawsuit or ancillary to litigation. Redbox Automated Retail, LLC v. Buena Vista Home Entertainment, Inc., 399 F. Supp. 3d 1018 (C.D. Cal. 2019); Westgate Resorts, Ltd. v. Sussman, 387 F. Supp. 3d 1318 (M.D. Fla. 2019).

Protected petitioning activity under the *Noerr-Pennington* doctrine includes bringing a lawsuit, defending a lawsuit brought by another, and filing papers with a court. Cisco Systems, Inc. v. Beccela's Etc., LLC, 403 F. Supp. 3d 813 (N.D. Cal. 2019).

5 New West, L.P. v. City of Joliet, 491 F.3d 717 (7th Cir. 2007).

6 Sosa v. DIRECTV, Inc., 437 F.3d 923 (9th Cir. 2006).

7 Kearney v. Foley & Lardner, LLP, 566 F.3d 826 (9th Cir. 2009), opinion amended and superseded on other grounds on denial of reh'g, 582 F.3d 896 (9th Cir. 2009), opinion amended and superseded on other grounds on denial of reh'g, 590 F.3d 638 (9th Cir. 2009).

The *Noerr-Pennington* doctrine originates from the First Amendment's guarantee of the right of the people to petition the government for a redress of grievances. William Villa v. Heller, 885 F. Supp. 2d 1042 (S.D. Cal. 2012).

8 Sosa v. DIRECTV, Inc., 437 F.3d 923 (9th Cir. 2006).

9 Kearney v. Foley & Lardner, LLP, 566 F.3d 826 (9th Cir. 2009), opinion amended and superseded on other grounds on denial of reh'g, 582 F.3d 896 (9th Cir. 2009), opinion amended and superseded on other grounds on denial of reh'g, 590 F.3d 638 (9th Cir. 2009).

10 New West, L.P. v. City of Joliet, 491 F.3d 717 (7th Cir. 2007) (noting that as far as the national government is concerned, a municipality has a right to speak and petition for redress of grievances).

11 Cisco Systems, Inc. v. Beccela's Etc., LLC, 403 F. Supp. 3d 813 (N.D. Cal. 2019).

12 Tricon Precast, Ltd. v. Easi Set Industries, Inc., 395 F. Supp. 3d 871 (S.D. Tex. 2019).

13 Knology, Inc. v. Insight Communications Co., 393 F.3d 656, 2004 FED App. 0440P (6th Cir. 2004).

The *Noerr-Pennington* doctrine has been extended to citizens' efforts to influence administrative agencies. Grand Communities, Ltd. v. Stepner, 170 S.W.3d 411 (Ky. Ct. App. 2004).

14 Singh v. Sukhram, 56 A.D.3d 187, 866 N.Y.S.2d 267 (2d Dep't 2008).

As to a petitioner's motive in seeking redress, generally, see § 571.

15 BE & K Const. Co. v. N.L.R.B., 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002).

Under the *Noerr-Pennington* doctrine, activities within the normal scope of petitioning which represent attempts to secure anticompetitive governmental responses are exempt from antitrust liability. Grand Communities, Ltd. v. Stepner, 170 S.W.3d 411 (Ky. Ct. App. 2004).

16 William Villa v. Heller, 885 F. Supp. 2d 1042 (S.D. Cal. 2012).

17 Venetian Casino Resort, L.L.C. v. N.L.R.B., 793 F.3d 85 (D.C. Cir. 2015).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(3) Right to Petition

(c) *Noerr-Pennington* Doctrine

§ 575. Exceptions to immunity from statutory liability for petitioning any department of government for redress

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1437(1), 1437(2)

The antitrust immunity conferred by the First Amendment's Petition Clause does not extend to sham antitrust actions.[1] Thus, a "sham" exception to the *Noerr-Pennington* doctrine exists to prevent the immunization of conduct that uses governmental process as an anticompetitive weapon.[2] The sham exception to the *Noerr-Pennington* doctrine involves attempts to influence public officials for the sole purpose of expense or delay. To apply the sham exception, the evidence must show that a defendant's lobbying activities were objectively baseless. Lobbying activity is objectively baseless if a reasonable private citizen could not expect to secure favorable government action.[3]

Observation:

Although the *Noerr-Pennington* doctrine applies to activities directed at any branch of government, the scope of the sham exception depends on the type of governmental entity involved; if it is the legislature, the sham exception is extraordinarily narrow because

if the challenged conduct consists of lobbying a legislative body it would seem quite pointless to ask whether the lobbying effort was objectively baseless.[4]

The *Noerr-Pennington* doctrine also does not protect petitions predicated on fraud or deliberate misrepresentation.[5]

Footnotes

1 BE & K Const. Co. v. N.L.R.B., 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002).

2 Kearney v. Foley & Lardner, LLP, 566 F.3d 826 (9th Cir. 2009), opinion amended and superseded on other grounds on denial of reh'g, 582 F.3d 896 (9th Cir. 2009), opinion amended and superseded on other grounds on denial of reh'g, 590 F.3d 638 (9th Cir. 2009); Tricon Precast, Ltd. v. Easi Set Industries, Inc., 395 F. Supp. 3d 871 (S.D. Tex. 2019); Penllyn Greene Associates, L.P. v. Clouser, 890 A.2d 424 (Pa. Commw. Ct. 2005); Anderson Development Co. v. Tobias, 2005 UT 36, 116 P.3d 323 (Utah 2005).
Under the sham exception to the *Noerr-Pennington* doctrine, activity ostensibly directed toward influencing governmental action does not qualify for immunity if it is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor.
Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545, 134 S. Ct. 1749, 188 L. Ed. 2d 816 (2014).

3 Tricon Precast, Ltd. v. Easi Set Industries, Inc., 395 F. Supp. 3d 871 (S.D. Tex. 2019).

4 Ex parte Simpson, 36 So. 3d 15 (Ala. 2009).

5 U.S. v. Philip Morris USA Inc., 566 F.3d 1095, 73 Fed. R. Serv. 3d 896 (D.C. Cir. 2009).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(3) Right to Petition

(d) Petitions by Particular Persons

§ 576. Petition by public employees for purposes of right to petition

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1435

It has been held that any lawsuit brought by an employee against a public employer qualifies as a protected "petition" under the First Amendment so long as it is not sham litigation.[1] However, it has also been held that a public employee's First Amendment right-to-petition claim must involve a matter of public concern to be constitutionally protected.[2] If a public employee's petition to the government for redress of grievances is not both made as a matter of public concern and made as a citizen, then the petition is not protected under the First Amendment.[3]

Footnotes

1 Hill v. City of Scranton, 411 F.3d 118 (3d Cir. 2005).
As to the right to petition not protecting sham litigation, generally, see § 567.

2 Harmon v. Dallas County, Texas, 927 F.3d 884 (5th Cir. 2019), as revised on other grounds, (July 9, 2019); Heritage Constructors, Inc. v. City of Greenwood, Ark., 545 F.3d 599 (8th Cir. 2008); Howard v. City of

Coos Bay, 871 F.3d 1032 (9th Cir. 2017); Pettengell v. Scott, 369 F. Supp. 3d 882 (N.D. Ill. 2019); Lapolla v. County of Union, 449 N.J. Super. 288, 157 A.3d 458 (App. Div. 2017).

3 D'Angelo v. School Bd. of Polk County, Fla., 497 F.3d 1203, 223 Ed. Law Rep. 598 (11th Cir. 2007).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

d. Right to Assemble Peaceably and to Petition Government

(3) Right to Petition

(d) Petitions by Particular Persons

§ 577. Petition by prisoners for purposes of right to petition

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1438

Persons in prison, like other individuals, have the right to petition the government for redress of grievances.[1] Thus, the filing of a nonfrivolous[2] prison grievance,[3] like the filing of an inmate lawsuit,[4] is protected First Amendment activity. A prison official may not file a disciplinary charge based upon false allegations in retaliation for the inmate's filed grievances against prison officials.[5] The First Amendment protections also include access of prisoners to the courts for the purpose of presenting their complaints.[6]

First Amendment rights to petition the government for a redress of grievances are violated when a prisoner is punished for filing a grievance concerning the conditions of his or her confinement.[7]

Observation:

A prisoner should not be denied a remedy for retaliation for exercising his or her First Amendment rights because his or her extraordinary efforts resulted in the resolution of grievances that a similarly situated individual of ordinary firmness would have been deterred from filing.[8]

Caution:

Claims of retaliation under the First Amendment, based on an inmate's filing of a grievance, fail if the alleged retaliatory conduct violations were issued for the actual violation of a prison rule.[9]

Practice Tip:

To prevail in a retaliation claim, a prisoner must ultimately show that (1) he or she engaged in activity protected by the First Amendment, (2) he or she suffered a deprivation that would likely deter First Amendment activity in the future, and (3) the First Amendment activity was at least a motivating factor in the defendants' decision to take the retaliatory action.[10]

CUMULATIVE SUPPLEMENT

Cases:

Although the filing of complaints and grievances against jail officials is protected conduct under the First Amendment, being moved between cells is something that is an act inherent to incarceration and one that falls squarely within the scope of de minimis actions that do not support the adverse action requirement of a § 1983 First Amendment retaliation claim. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983. Montgomery v. Whidbee, 446 F. Supp. 3d 306 (M.D. Tenn. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009).

2 Hasan v. U.S. Dept. of Labor, 400 F.3d 1001 (7th Cir. 2005); Harris v. Walls, 53 F. Supp. 3d 1092 (C.D. Ill. 2014), aff'd, 604 Fed. Appx. 518 (7th Cir. 2015).

3 Brandon v. Kinter, 938 F.3d 21 (2d Cir. 2019); Baughman v. Hickman, 935 F.3d 302 (5th Cir. 2019); Lewis v. Jacks, 486 F.3d 1025 (8th Cir. 2007).
Inmates retain the protection of the First Amendment to petition the government for the redress of grievances. Bazzetta v. McGinnis, 430 F.3d 795 (6th Cir. 2005).

4 Lewis v. Jacks, 486 F.3d 1025 (8th Cir. 2007).
Under First Amendment, prison officials may not retaliate against prisoners for initiating litigation. Grenning v. Klemme, 34 F. Supp. 3d 1144 (E.D. Wash. 2014).

5 Muntaqim v. Kelley, 2019 Ark. 240, 581 S.W.3d 496 (2019).

6 Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009).
As to the right of prisoners to access to the courts, generally, see Am. Jur. 2d, Penal and Correctional Institutions § 62.

7 Hasan v. U.S. Dept. of Labor, 400 F.3d 1001 (7th Cir. 2005); Boxer X v. Harris, 437 F.3d 1107 (11th Cir. 2006).

8 Brandon v. Kinter, 938 F.3d 21 (2d Cir. 2019).

9 Muntaqim v. Kelley, 2019 Ark. 240, 581 S.W.3d 496 (2019).

10 Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009).
As to retaliation for seeking judicial remedies, generally, see § 568.

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(1) General Considerations

§ 578. Freedom of association as basic constitutional freedom

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1440

A.L.R. Library

Validity, Construction, and Application of State Sex Offender Statutes Prohibiting Use of Computers and Internet as Conditions of Probation or Sentence, 89 A.L.R.6th 261

The freedom of association is a basic constitutional freedom that lies at the foundation of a free society.[1] Freedom of association is a fundamental liberty guaranteed[2] and protected[3] by the First Amendment. It is protected from infringement by the states under the 14th Amendment.[4] The First Amendment protects an individual's right to join groups and associate with others holding similar beliefs.[5]

In other words, among the rights protected by the First Amendment is the right of individuals to associate with whom they please,[6] to further their personal beliefs[7] and ideas,[8] and to air grievances.[9] The ability of like-minded individuals to associate

for the purpose of expressing commonly held views may not be curtailed under the First Amendment.[10] In addition, the First Amendment protects an individual's right to hold and express unpopular views and to associate with others who share that viewpoint.[11] Moreover, the Constitution protects free association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield,[12] and without regard to the calling of the person claiming the right.[13] Further, the First Amendment bars retaliation for association.[14]

Observation:

The First Amendment right to associate and to advocate provides no guarantee that a speech will persuade or that advocacy will be effective.[15]

Footnotes

1 Wingate v. Gage County School Dist., No. 34, 528 F.3d 1074, 233 Ed. Law Rep. 524 (8th Cir. 2008).

2 In re Bay Area Citizens Against Lawsuit Abuse, 982 S.W.2d 371 (Tex. 1998).
As to the right of association as implicit in the First Amendment, see § 579.

3 Murphy v. State, 837 N.E.2d 591 (Ind. Ct. App. 2005).
The First Amendment protects political association as well as political expression. Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

4 Democratic Party of U. S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 101 S. Ct. 1010, 67 L. Ed. 2d 82 (1981); Murphy v. State, 837 N.E.2d 591 (Ind. Ct. App. 2005).

5 Dawson v. Delaware, 503 U.S. 159, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992).
The First Amendment protects the practice of persons sharing common views banding together to achieve a common end. Donohue v. Milan, 942 F.3d 609 (2d Cir. 2019).
The constitutional freedom of association guarantees an opportunity for people to express their ideas and beliefs through membership or affiliation with a group. Town of Hanover v. New England Regional Council of Carpenters, 467 Mass. 587, 6 N.E.3d 522 (2014).

6 State v. J.P., 907 So. 2d 1101 (Fla. 2004).

7 Healy v. James, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972).
The First Amendment protects the freedom of individuals to associate for the purpose of advancing beliefs and ideas. Sanger v. Dennis, 148 P.3d 404 (Colo. App. 2006).

8 Sanger v. Dennis, 148 P.3d 404 (Colo. App. 2006); In re Bay Area Citizens Against Lawsuit Abuse, 982 S.W.2d 371 (Tex. 1998).

9 In re Bay Area Citizens Against Lawsuit Abuse, 982 S.W.2d 371 (Tex. 1998).

10 Knox v. Service Employees Intern. Union, Local 1000, 567 U.S. 298, 132 S. Ct. 2277, 183 L. Ed. 2d 281 (2012).

11 State v. Monschke, 133 Wash. App. 313, 135 P.3d 966 (Div. 2 2006).

12 National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).

13 Shelton v. Tucker, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960).

14 Buck v. City of Albuquerque, 549 F.3d 1269 (10th Cir. 2008).

15 Smith v. Arkansas State Highway Emp., Local 1315, 441 U.S. 463, 99 S. Ct. 1826, 60 L. Ed. 2d 360 (1979).

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16A Am. Jur. 2d Constitutional Law § 579

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(1) General Considerations

§ 579. Freedom of association as implicit in First Amendment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1440

While the First Amendment encompasses a freedom of association right,[1] freedom of association is not specifically mentioned[2] or enumerated[3] in the First Amendment. There is no right of association in the abstract.[4] Rather, the First Amendment's right of association is dependent on the underlying individual rights of expression.[5]

Courts have explained that the freedom or right of association is inherently part of,[6] is implicit in,[7] evolves from,[8] or derives from[9] the activities protected by the First Amendment, including the rights of free speech, assembly, petition, and free exercise. In other words, implicit in the right to engage in First Amendment-protected activities is a right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.[10] The constitutionally protected right to associate for expressive purposes exists if the activity for which persons are associating is itself protected by the First Amendment.[11] Freedom of association is protected so that other activities imbedded in the First Amendment might be fully safeguarded and allowed to flourish.[12]

Observation:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.[13]

Footnotes

1 Dible v. City of Chandler, 515 F.3d 918 (9th Cir. 2008).
As to the protection of the right of association by the First Amendment, see § 578.

2 Eccles v. Nelson, 919 So. 2d 658 (Fla. 5th DCA 2006).

3 In re GlaxoSmithKline plc, 732 N.W.2d 257 (Minn. 2007).

4 Wine and Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36 (1st Cir. 2005).

5 Wine and Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36 (1st Cir. 2005).

6 Republican Party of Minnesota v. White, 416 F.3d 738 (8th Cir. 2005).

7 Healy v. James, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972); Christian Legal Society v. Walker, 453 F.3d 853, 210 Ed. Law Rep. 916 (7th Cir. 2006); Grace United Methodist Church v. City Of Cheyenne, 451 F.3d 643, 65 Fed. R. Serv. 3d 248 (10th Cir. 2006).

8 Wine and Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36 (1st Cir. 2005).
Freedom of association appears to have grown out of the guarantee of the right to peaceably assemble and out of the freedom of speech. Eccles v. Nelson, 919 So. 2d 658 (Fla. 5th DCA 2006).

9 Cobb v. Pozzi, 363 F.3d 89 (2d Cir. 2004).
The freedom of association is a derivative right. In re GlaxoSmithKline plc, 732 N.W.2d 257 (Minn. 2007).

10 Roberts v. U.S. Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); Tabbaa v. Chertoff, 509 F.3d 89 (2d Cir. 2007); Club Retro, L.L.C. v. Hilton, 568 F.3d 181 (5th Cir. 2009); In re GlaxoSmithKline plc, 732 N.W.2d 257 (Minn. 2007).

11 Willis v. Town Of Marshall, N.C., 426 F.3d 251 (4th Cir. 2005).

12 Eccles v. Nelson, 919 So. 2d 658 (Fla. 5th DCA 2006).

13 National Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); In re GlaxoSmithKline plc, 732 N.W.2d 257 (Minn. 2007).
The ability and opportunity to combine with others to advance one's views are powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed individuals as against the government. New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(1) General Considerations

§ 580. Nature of right of association

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1440

Freedom of association, although not explicitly enumerated in the First Amendment, is a right included within the "penumbra" of the First Amendment.[1] The right of association may be traced to Justice Harlan's opinion for the Supreme Court in *NAACP v. Alabama*.[2] In prior opinions, however, the Supreme Court had suggested that a "right of association" existed.[3]

Footnotes

1 McDonald v. Grand Traverse County Election Com'n, 255 Mich. App. 674, 662 N.W.2d 804 (2003).
For general discussion of the "penumbra" doctrine, see § 413.

2 National Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958).

3 Sweezy v. State of N.H. by Wyman, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957); Watkins v. U.S., 354 U.S. 178, 77 S. Ct. 1173, 1 L. Ed. 2d 1273, 76 Ohio L. Abs. 225 (1957); Schware v. Board of Bar Exam. of State of N.M., 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796, 64 A.L.R.2d 288 (1957); Railway Emp. Dept.

v. Hanson, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed. 1112 (1956); American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(1) General Considerations

§ 581. Freedom of association as encompassing both intimate association and expressive association

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1441, 1442

The freedom of association encompasses both (1) a right to enter into and maintain certain intimate human relationships, and (2) a right to associate for the purpose of engaging in those activities protected by the First Amendment, including speech, assembly, petition for the redress of grievances, and the exercise of religion.[1]

The right to intimate association guarantees an individual the choice of entering into an intimate relationship free from undue intrusion by the state.[2] The right to free association for expressive purposes is an instrumental one.[3] The Constitution guarantees freedom of expressive association as an indispensable means of preserving other individual liberties.[4] That is, the right to freedom of expressive association protects people's right to associate for the purpose of engaging in activities protected by the First Amendment, including petitioning the government for the redress of grievances.[5] However, encounters that contain no element of expression are not protected.[6]

Observation:

If a group engages in expressive association, constitutional protections are only implicated if the government action would significantly affect the group's ability to advocate public or private viewpoints.[7]

Courts generally observe that the freedom of expressive association arises from the First Amendment and ensures the right to associate for the purpose of engaging in activities protected by First Amendment.[8] Some authority holds that the freedom of intimate association receives protection as a fundamental element of personal liberty under the due process clauses.[9] Other authority holds that relationships that exemplify intimate associations are protected by the First Amendment.[10] However, First Amendment protection is not implicated in a relationship that is not within the category of protected intimate relationships.[11]

CUMULATIVE SUPPLEMENT

Cases:

Determining the limits of state authority over an individual's freedom to enter into a particular association, for purpose of considering right to freedom of intimate association protected under substantive due process of Fourteenth Amendment, unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. U.S. Const. Amend. 14. Six v. Newsom, 462 F. Supp. 3d 1060 (C.D. Cal. 2020).

California's stay at home order did not prohibit substantially more expressive association than necessary to advance its interest in slowing the spread of COVID-19, and thus, permit applicants were unlikely to succeed on the merits of their First Amendment freedom of assembly claim, for purposes of temporary restraining order analysis; the State's stay at home order and resulting moratorium on permits for large gatherings sought to suppress the virus, not expressive association, and protecting California's residents from a global pandemic and its local outbreak amounted to a compelling state interest. U.S. Const. Amend. 1. Givens v. Newsom, 459 F. Supp. 3d 1302 (E.D. Cal. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Roberts v. U.S. Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); Sanitation and Recycling Industry, Inc. v. City of New York, 107 F.3d 985 (2d Cir. 1997); Iota Xi Chapter Of Sigma Chi Fraternity v. Patterson, 566 F.3d 138, 244 Ed. Law Rep. 549 (4th Cir. 2009); Montgomery v. Stefaniak, 410 F.3d 933 (7th Cir. 2005); Dible v. City of Chandler, 515 F.3d 918 (9th Cir. 2008); American Lithuanian Naturalization

Club, Athol, Mass., Inc. v. Board of Health of Athol, 446 Mass. 310, 844 N.E.2d 231 (2006); Bowling Green v. Schabel, 2005-Ohio-6522, 970 N.E.2d 484 (Ohio Ct. App. 6th Dist. Wood County 2005).

2 Roberts v. U.S. Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); Sanitation and Recycling Industry, Inc. v. City of New York, 107 F.3d 985 (2d Cir. 1997).

3 Hsu By and Through Hsu v. Roslyn Union Free School Dist. No. 3, 85 F.3d 839, 109 Ed. Law Rep. 1145 (2d Cir. 1996).

"Instrumental associations" include those associations indispensable to the preservation of other individual liberties, including those activities protected by the First Amendment. State v. Holm, 2006 UT 31, 137 P.3d 726, 22 A.L.R.6th 665 (Utah 2006).

4 Roberts v. U.S. Jaycees, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); Hsu By and Through Hsu v. Roslyn Union Free School Dist. No. 3, 85 F.3d 839, 109 Ed. Law Rep. 1145 (2d Cir. 1996).

5 Krystkowiak v. W.O. Brisben Companies, Inc., 90 P.3d 859 (Colo. 2004); Bowling Green v. Schabel, 2005-Ohio-6522, 970 N.E.2d 484 (Ohio Ct. App. 6th Dist. Wood County 2005).

Associating for the purpose of placing an issue on the ballot is action protected by the First Amendment. Chandler v. City of Arvada, Colorado, 233 F. Supp. 2d 1304 (D. Colo. 2001), aff'd in part, rev'd in part on other grounds, 292 F.3d 1236, 13 A.L.R.6th 861 (10th Cir. 2002).

6 Club Retro, L.L.C. v. Hilton, 568 F.3d 181 (5th Cir. 2009) (chance encounters at a dance club).

7 Kuvin v. City of Coral Gables, 45 So. 3d 836 (Fla. 3d DCA 2010), republished at, 62 So. 3d 625 (Fla. 3d DCA 2010).

8 Montgomery v. Stefaniak, 410 F.3d 933 (7th Cir. 2005).

The First Amendment protects expressive association. Southern Oregon Barter Fair v. Jackson County, Oregon, 372 F.3d 1128 (9th Cir. 2004).

The freedom of expressive association derives from the First Amendment. American Legion Post #149 v. Washington State Dept. of Health, 164 Wash. 2d 570, 192 P.3d 306 (2008).

9 Montgomery v. Stefaniak, 410 F.3d 933 (7th Cir. 2005) (referring to U.S. Const. Amend. V, cl. 3; U.S. Const. Amend. XIV, § 1).

10 Piscottano v. Murphy, 511 F.3d 247 (2d Cir. 2007).

The First Amendment freedom of association protects citizens' freedom of both intimate and expressive association. Krystkowiak v. W.O. Brisben Companies, Inc., 90 P.3d 859 (Colo. 2004).

11 Berrios v. State University of New York at Stony Brook, 518 F. Supp. 2d 409, 227 Ed. Law Rep. 190 (E.D. N.Y. 2007) (discussing the working relationship between a research associate at state university and her research professor).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(1) General Considerations

§ 582. Freedom of association as encompassing both intimate association and expressive association—Nature of intimate association

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1442 to 1444

Relationships that exemplify intimate associations protected by the First Amendment are those that attend the creation and sustenance of a family,[1] such as—

— marriage.[2]

— childbirth.[3]

— the raising and education of children.[4]

— the sibling relationship.[5]

— cohabitation with one's relatives.[6]

Observation:

In determining whether a relationship qualifies as an intimate human relationship for the purposes of the constitutional right to the freedom of intimate association, courts may look at the size, degree of selectivity in beginning and maintaining the group, and seclusion from others.[7]

CUMULATIVE SUPPLEMENT

Cases:

As a general matter, only relationships with qualities that attend the creation and sustenance of a family are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty, as necessary for such relationships to be protected by freedom of intimate association, pursuant to substantive due process of Fourteenth Amendment; conversely, a relationship lacking those qualities- such as a large business enterprise- seems remote from the concerns giving rise to that constitutional protection. U.S. Const. Amend. 14. Six v. Newsom, 462 F. Supp. 3d 1060 (C.D. Cal. 2020).

[END OF SUPPLEMENT]

Footnotes

1 Piscottano v. Murphy, 511 F.3d 247 (2d Cir. 2007); Bowling Green v. Schabel, 2005-Ohio-6522, 970 N.E.2d 484 (Ohio Ct. App. 6th Dist. Wood County 2005); American Legion Post #149 v. Washington State Dept. of Health, 164 Wash. 2d 570, 192 P.3d 306 (2008).

2 Piscottano v. Murphy, 511 F.3d 247 (2d Cir. 2007); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014) (abrogated on other grounds by, National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018)); Bowling Green v. Schabel, 2005-Ohio-6522, 970 N.E.2d 484 (Ohio Ct. App. 6th Dist. Wood County 2005); American Legion Post #149 v. Washington State Dept. of Health, 164 Wash. 2d 570, 192 P.3d 306 (2008).

The right of intimate association protects certain intimate human relationships, such as the husband-wife relationship, from state intrusion. Wingate v. Gage County School Dist., No. 34, 528 F.3d 1074, 233 Ed. Law Rep. 524 (8th Cir. 2008).

Same-sex couples have the same right as opposite-sex couples to enjoy intimate association. Obergefell v. Hodges, 135 S. Ct. 2584, 192 L. Ed. 2d 609 (2015).

3 Piscottano v. Murphy, 511 F.3d 247 (2d Cir. 2007); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014) (abrogated on other grounds by, National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018)); Bowling Green v. Schabel, 2005-Ohio-6522, 970 N.E.2d 484 (Ohio Ct. App. 6th Dist. Wood County 2005); American Legion Post #149 v. Washington State Dept. of Health, 164 Wash. 2d 570, 192 P.3d 306 (2008).

4 Piscottano v. Murphy, 511 F.3d 247 (2d Cir. 2007); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014) (abrogated on other grounds by, National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018)); Bowling Green v. Schabel, 2005-Ohio-6522, 970 N.E.2d 484 (Ohio Ct. App.

6th Dist. Wood County 2005); American Legion Post #149 v. Washington State Dept. of Health, 164 Wash. 2d 570, 192 P.3d 306 (2008).

The constitutional protection of the freedom of association that extends to child rearing and education refers to the familial relationship between parents and their children but does not extend beyond the family relationship to afford constitutional protection to the family's educational relationship to a school. Angstadt ex rel. Angstadt v. Midd-West School Dist., 286 F. Supp. 2d 436, 182 Ed. Law Rep. 820 (M.D. Pa. 2003), order aff'd, 377 F.3d 338, 190 Ed. Law Rep. 48 (3d Cir. 2004).

5 Miron v. Town of Stratford, 976 F. Supp. 2d 120 (D. Conn. 2013).

6 Piscottano v. Murphy, 511 F.3d 247 (2d Cir. 2007); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014) (abrogated on other grounds by, National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018)); Bowling Green v. Schabel, 2005-Ohio-6522, 970 N.E.2d 484 (Ohio Ct. App. 6th Dist. Wood County 2005); American Legion Post #149 v. Washington State Dept. of Health, 164 Wash. 2d 570, 192 P.3d 306 (2008).

7 American Legion Post #149 v. Washington State Dept. of Health, 164 Wash. 2d 570, 192 P.3d 306 (2008).

A village zoning ordinance prohibiting the occupancy of one-family dwellings by more than two unrelated persons, while permitting occupancy by any number of persons related by blood, adoption, or marriage, is not an unconstitutional violation of the right of association. Village of Belle Terre v. Boraas, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974).

Relationships with large business enterprises like health insurance companies do not qualify as intimate associations warranting constitutional protection under the freedom of association. U.S. Citizens Ass'n v. Sebelius, 705 F.3d 588 (6th Cir. 2013).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(1) General Considerations

§ 583. Scope and extent of freedom of association

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1440

On a constitutional level, the right to free association is not absolute.[1] The nature and degree of the constitutional protection granted to the freedom of association may vary, depending on the extent to which a constitutionally protected liberty is at stake.[2]

CUMULATIVE SUPPLEMENT

Cases:

Assertions by attorney, who was registered as a political independent, that he wanted to be, and would apply to be, a judge on a Delaware court, in the absence of any evidence that he was able and ready to apply in the imminent future, were insufficient to show a concrete, particularized, and imminent injury-in-fact, as would be required for Article III standing to challenge under the First Amendment right to association the provision of the Delaware Constitution limiting judgeships on some state courts to applicants from one of the two major political parties. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; Del. Const. art. 4, § 3. Carney v. Adams, 141 S. Ct. 493 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Hsu By and Through Hsu v. Roslyn Union Free School Dist. No. 3, 85 F.3d 839, 109 Ed. Law Rep. 1145 (2d Cir. 1996); Wingate v. Gage County School Dist., No. 34, 528 F.3d 1074, 233 Ed. Law Rep. 524 (8th Cir. 2008); Eccles v. Nelson, 919 So. 2d 658 (Fla. 5th DCA 2006); McDonald v. Grand Traverse County Election Com'n, 255 Mich. App. 674, 662 N.W.2d 804 (2003); Fraternal Order of Police v. County of Douglas, 270 Neb. 118, 699 N.W.2d 820 (2005), opinion modified on other grounds on denial of reh'g, Fraternal Order of Police, Lodge No. 8 v. County of Douglas, 270 Neb. 469, 745 N.W.2d 883 (2005).
The right to expressive association is not absolute. Heartland Academy Community Church v. Waddle, 427 F.3d 525, 202 Ed. Law Rep. 629 (8th Cir. 2005).

2 McDonald v. Grand Traverse County Election Com'n, 255 Mich. App. 674, 662 N.W.2d 804 (2003).
The scope of protection for association corresponds to the constitutional solicitude afforded to the mode of First Amendment expression in which a particular group seeks collectively to engage. Wine and Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36 (1st Cir. 2005).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(1) General Considerations

§ 584. Group aspects of right of association

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1440

The Constitution accords the same protection independently to associations as it does to individuals.[1] The right to freedom of association is a right enjoyed by religious and secular groups alike.[2] Government action impermissibly burdens the freedom to associate by interfering with the internal organization or affairs of the group.[3] Freedom to associate also extends to group associations for social purposes,[4] though the Constitution does not recognize a generalized right of social association.[5] The right to association extends to protect group assertion of mutual economic or legal interests,[6] but the right generally will not apply, for example, to business relationships.[7] Nor does associating purely for financial gain come under the umbrella of the First Amendment protection of the right to association.[8]

Observation:

When determining whether a person represented by an organization may lay claim to an associational right under the First Amendment, courts consider whether that person has engaged with others in a collective effort on behalf of shared goals.[9]

Caution:

The right of free association is hollow when the government can identify an association's members through internet service provider (ISP) subscriber information matched with particular internet activity.[10]

Freedom of association, in the sense protected by the First Amendment, does not extend to joining with others for the purpose of depriving third parties of their lawful rights.[11] Nor does the Constitution confer a right to association for illegal purposes.[12] The act of associating with compatriots in crime is not a constitutionally protected associational right;[13] there is no right to free association implicated when someone entices another with the intent to commit a criminal act on them.[14]

Footnotes

1 Green Party of New York State v. New York State Bd. of Elections, 389 F.3d 411 (2d Cir. 2004).
The First Amendment rights of association extend to private corporations. Eugster v. City of Spokane, 121 Wash. App. 799, 91 P.3d 117 (Div. 3 2004).

2 Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C., 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650, 274 Ed. Law Rep. 774 (2012).

3 Miller v. City of Cincinnati, 709 F. Supp. 2d 605 (S.D. Ohio 2008), aff'd, 622 F.3d 524 (6th Cir. 2010).

4 Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).
As to social clubs, see § 600.

5 Sanitation and Recycling Industry, Inc. v. City of New York, 107 F.3d 985 (2d Cir. 1997); Southern Oregon Barter Fair v. Jackson County, Oregon, 372 F.3d 1128 (9th Cir. 2004).

6 United Transp. Union v. State Bar of Mich., 401 U.S. 576, 91 S. Ct. 1076, 28 L. Ed. 2d 339 (1971); United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 88 S. Ct. 353, 19 L. Ed. 2d 426 (1967).
The First Amendment encompasses the associational right of groups to unite to assert their legal rights as effectively and economically as practicable. Frye v. Tenderloin Housing Clinic, Inc., 38 Cal. 4th 23, 40 Cal. Rptr. 3d 221, 129 P.3d 408 (2006).

7 Sanitation and Recycling Industry, Inc. v. City of New York, 107 F.3d 985 (2d Cir. 1997).

8 In re GlaxoSmithKline plc, 713 N.W.2d 48 (Minn. Ct. App. 2006), aff'd in part, rev'd in part on other grounds, 732 N.W.2d 257 (Minn. 2007).
A law refusing licenses for carting commercial waste to applicants who associated with criminals does not violate the right to intimate association, as the law is limited to purely business associations. Sanitation and Recycling Industry, Inc. v. City of New York, 107 F.3d 985 (2d Cir. 1997).

9 Donohue v. Milan, 942 F.3d 609 (2d Cir. 2019).

10 State v. Mixton, 247 Ariz. 212, 447 P.3d 829 (Ct. App. Div. 2 2019), review granted, (Nov. 19, 2019).

11 Madsen v. Women's Health Center, Inc., 512 U.S. 753, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994); People ex rel. Totten v. Colonia Chiques, 156 Cal. App. 4th 31, 67 Cal. Rptr. 3d 70 (2d Dist. 2007).

12 State v. Talty, 103 Ohio St. 3d 177, 2004-Ohio-4888, 814 N.E.2d 1201 (2004).
An adulterous relationship is not subject to the First Amendment right to intimate association. Beecham v. Henderson County, Tennessee, 422 F.3d 372, 2005 FED App. 0385P (6th Cir. 2005).

13 Rodriguez v. State, 284 Ga. 803, 671 S.E.2d 497 (2009).

14 Com. v. Disler, 451 Mass. 216, 884 N.E.2d 500 (2008) (holding that soliciting criminal sexual activity over the Internet does not implicate the freedom of association).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(1) General Considerations

§ 585. Group aspects of right of association—Assertion of right

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 728, 1440

The United States Supreme Court has recognized the standing of organizations to assert the constitutional rights of their members.[1] An association also may assert the right to freedom of association on its own behalf, at least where it is engaged in constitutionally protected activities.[2]

Footnotes

1 National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); Bates v. City of Little Rock, 361 U.S. 516, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960).
As an exception to the general standing rule, an overbreadth challenge to a statute is permitted when the First Amendment right to freedom of association is implicated. ACLU v. City of Albuquerque, 142 N.M. 259, 2007-NMCA-092, 164 P.3d 958 (Ct. App. 2007), decision aff'd, 2008-NMSC-045, 144 N.M. 471, 188 P.3d 1222 (2008).
As to the interest generally held necessary to raise questions of constitutionality of legislation, generally, see §§ 137 to 149.

2 National Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(2) Restrictions

(a) In General

§ 586. Restrictions on right of association, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1440, 1450

The right to freedom of association, though protected by the First Amendment, is not absolute.[1] Even a significant interference with an individual's freedom of association may be sustained if there exists a sufficiently important state interest, and the means employed are narrowly drawn to avoid unnecessary abridgement of associational freedoms.[2] The right to expressive association may be abridged in the face of compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.[3] In assessing a First Amendment associational-rights claim, a court must balance the associational interest asserted against the conflicting regulatory interest.[4]

When a state imposes limitations on individuals wishing to band together to advance their views while placing none on individuals acting alone, it is clearly a restraint on the right of association.[5] Governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights.[6] Further, government action can constitute direct and substantial interference with associational rights, in violation of the First Amendment, even if there is no prior restraint and no clear chilling of future expressive activity.[7]

CUMULATIVE SUPPLEMENT

Cases:

Even if attorney, who was registered as a political independent, felt sincerely and strongly that Delaware's laws should comply with the federal Constitution, his generalized grievance, which was shared with all Delaware citizens, was not a concrete, particularized, and imminent injury-in-fact, as would be required for Article III standing to challenge under the First Amendment right to association the provisions of the Delaware Constitution limiting judgeships on state courts to a bare majority of applicants from one of the two major political parties, and requiring the rest of the judges on some of those courts to be applicants from the other major political party. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1; Del. Const. art. 4, § 3. Carney v. Adams, 141 S. Ct. 493 (2020).

A GPS device provides the government with a detailed, encyclopedic, and effortlessly compiled log of the individual's movements, and this relentless, 24-hour per day observation chills associational and expressive freedoms, potentially altering the relationship between citizen and government in a way that is inimical to democratic society. U.S. Const. Amend. 4; Mass. Const. pt. 1, art. 14. Garcia v. Commonwealth, 486 Mass. 341, 158 N.E.3d 452 (2020).

[END OF SUPPLEMENT]

Footnotes

1 § 583.

2 Wingate v. Gage County School Dist., No. 34, 528 F.3d 1074, 233 Ed. Law Rep. 524 (8th Cir. 2008).
The imposition of even substantial restrictions on the First Amendment right to associate does not automatically invalidate a statute. McDonald v. Grand Traverse County Election Com'n, 255 Mich. App. 674, 662 N.W.2d 804 (2003).

3 Christian Legal Society v. Walker, 453 F.3d 853, 210 Ed. Law Rep. 916 (7th Cir. 2006); Heartland Academy Community Church v. Waddle, 427 F.3d 525, 202 Ed. Law Rep. 629 (8th Cir. 2005).

4 Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York, 502 F.3d 136, 225 Ed. Law Rep. 101 (2d Cir. 2007).

5 Colorado Educ. Ass'n v. Rutt, 184 P.3d 65, 232 Ed. Law Rep. 455 (Colo. 2008).

6 Laird v. Tatum, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972).

7 Tabbaa v. Chertoff, 509 F.3d 89 (2d Cir. 2007).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(2) Restrictions

(a) In General

§ 587. Level of scrutiny applicable when evaluating First Amendment challenge to limitation on associational freedom

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1440

When evaluating a First Amendment challenge to a limitation on associational freedom, courts apply either strict scrutiny, in which case the restriction survives only if it is narrowly drawn to advance a compelling state interest, or rational basis review, in which case the restriction need only be rationally related to a legitimate government interest.[1]

Infringements on First Amendment expressive association are subject to strict scrutiny.[2] In the context of the First Amendment, a direct and substantial interference with intimate associations is also subject to strict scrutiny[3] or heightened review.[4]

Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest.[5] To survive strict scrutiny, significant encroachments on the right of association guaranteed by the First Amendment cannot be justified by a mere showing of some legitimate governmental interest.[6] Suppositions and speculative interests are not sufficient to justify a severe burden on free association rights.[7]

However, strict scrutiny is appropriate only if the burden on the right of association is severe.[8] Lesser intrusions on the right to intimate association by government action, that is, those intrusions that are not direct and substantial, receive rational basis review.[9] The mere fact that an asserted associational interest is recognized by the First Amendment does not necessarily mean that a regulation which burdens that interest must satisfy strict scrutiny.[10] When regulations impose lesser burdens, a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.[11]

Observation:

In the context of public accommodations, laws and regulations that constrain associational freedom are subject to close scrutiny, and are permitted, under the First Amendment, only if they serve compelling state interests that are unrelated to the suppression of ideas, and are interests that cannot be advanced through significantly less restrictive means.[12]

Footnotes

1 Kraham v. Lippman, 478 F.3d 502 (2d Cir. 2007).

2 Christian Legal Society v. Walker, 453 F.3d 853, 210 Ed. Law Rep. 916 (7th Cir. 2006).

3 Anderson v. City of LaVergne, 371 F.3d 879, 2004 FED App. 0180P (6th Cir. 2004).

4 Beecham v. Henderson County, Tennessee, 422 F.3d 372, 2005 FED App. 0385P (6th Cir. 2005).

5 Clingman v. Beaver, 544 U.S. 581, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005); Patriot Party of Allegheny County v. Allegheny County Dept. of Elections, 95 F.3d 253, 112 Ed. Law Rep. 51 (3d Cir. 1996).
A compelling governmental interest will override the right to expressive association. Hsu By and Through Hsu v. Roslyn Union Free School Dist. No. 3, 85 F.3d 839, 109 Ed. Law Rep. 1145 (2d Cir. 1996).

6 Davis v. Federal Election Com'n, 554 U.S. 724, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008).

7 Libertarian Party of Ohio v. Blackwell, 462 F.3d 579, 2006 FED App. 0342P (6th Cir. 2006).

8 Clingman v. Beaver, 544 U.S. 581, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005).
Only government action that has a direct and substantial influence on intimate association receives a heightened review under the strict scrutiny standard. Flaskamp v. Dearborn Public Schools, 385 F.3d 935, 192 Ed. Law Rep. 359, 2004 FED App. 0343P (6th Cir. 2004).

9 Flaskamp v. Dearborn Public Schools, 385 F.3d 935, 192 Ed. Law Rep. 359, 2004 FED App. 0343P (6th Cir. 2004).

10 Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York, 502 F.3d 136, 225 Ed. Law Rep. 101 (2d Cir. 2007).

11 Clingman v. Beaver, 544 U.S. 581, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005).

12 Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838, 57 A.L.R. Fed. 2d 573 (2010).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(2) Restrictions

(b) Particular Restrictions

§ 588. Conditioning receipt of benefits on giving up some measure or facet of right to freedom of association

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1440

A state may not withhold benefits which it has the authority to award on the condition that a potential recipient agree to give up some measure or facet of his or her constitutionally protected right to freedom of association.[1] However, it is not improper for a state to condition a benefit on the recipient's (1) giving up or agreeing to give up an activity or association which is not protected by the Constitution, or (2) agreeing to answer questions about his or her associational activities which the state has a right to ask.[2]

Footnotes

1 Lefkowitz v. Cunningham, 431 U.S. 801, 97 S. Ct. 2132, 53 L. Ed. 2d 1 (1977); Application of Stolar, 401 U.S. 23, 91 S. Ct. 713, 27 L. Ed. 2d 657 (1971).

2 Healy v. James, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 91 S. Ct. 720, 27 L. Ed. 2d 749 (1971); In re Anastaplo, 366 U.S. 82, 81 S. Ct. 978, 6 L. Ed. 2d 135 (1961).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(2) Restrictions

(b) Particular Restrictions

§ 589. Right to anonymity or associational privacy as component of First Amendment freedom of association; compelling governmental interest

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1445

The right to freedom of association necessarily encompasses the right to privacy in one's associations, including religious associations[1] and minority group organizations.[2] Indeed, an essential component of the First Amendment freedom of association is a right of associational anonymity.[3] The inviolability of privacy in group association may in many circumstances be indispensable to the preservation of the First Amendment right to freedom of association,[4] particularly where a group espouses dissident beliefs.[5]

Thus, the right to privacy in one's political associations and beliefs will yield only to some subordinating interest of the state that is compelling, and then only if there is a substantial relation between the information sought and an overriding and compelling state interest.[6] In other words, the state may not require an individual to disclose his or her private associational relationships[7] except where such disclosure is compelled by a valid and legitimate state interest.[8] However, where the state has a subordinating interest in obtaining the names of an organization's members, which interest is sufficiently strong to warrant requiring such information to be given, it has been held constitutionally permissible for a state to seek to obtain a group's membership lists.[9]

Observation:

Concealment of one's face while demonstrating is not protected by the First Amendment freedom of association.[10]

Footnotes

1 Society of Jesus of New England v. Com., 441 Mass. 662, 808 N.E.2d 272 (2004).

2 § 598.

3 Lubin v. Agora, Inc., 389 Md. 1, 882 A.2d 833 (2005).

There is a vital relationship between freedom to associate and privacy in one's associations. In re Grand Jury Subpoena, No. 16-03-217, 875 F.3d 1179 (9th Cir. 2017).

4 In re Grand Jury Subpoena, No. 16-03-217, 875 F.3d 1179 (9th Cir. 2017); Eugster v. City of Spokane, 121 Wash. App. 799, 91 P.3d 117 (Div. 3 2004); Lassa v. Rongstad, 2006 WI 105, 294 Wis. 2d 187, 718 N.W.2d 673 (2006).

5 Eugster v. City of Spokane, 121 Wash. App. 799, 91 P.3d 117 (Div. 3 2004); Lassa v. Rongstad, 2006 WI 105, 294 Wis. 2d 187, 718 N.W.2d 673 (2006).

6 Brown v. Socialist Workers '74 Campaign Committee (Ohio), 459 U.S. 87, 103 S. Ct. 416, 74 L. Ed. 2d 250 (1982).

The state must demonstrate a compelling governmental interest in order to justify chilling a party's association right through disclosing information to the public. In re GlaxoSmithKline plc, 732 N.W.2d 257 (Minn. 2007).

7 DeGregory v. Attorney General of State of N. H., 383 U.S. 825, 86 S. Ct. 1148, 16 L. Ed. 2d 292 (1966); Bursey v. U. S., 466 F.2d 1059 (9th Cir. 1972).

8 Braden v. U.S., 365 U.S. 431, 81 S. Ct. 584, 5 L. Ed. 2d 653 (1961); Wilkinson v. U.S., 365 U.S. 399, 81 S. Ct. 567, 5 L. Ed. 2d 633 (1961).

Absent some countervailing governmental interest, the government cannot constitutionally compel disclosure of the identity of members of an organization. California Bankers Ass'n v. Shultz, 416 U.S. 21, 94 S. Ct. 1494, 39 L. Ed. 2d 812 (1974).

9 Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961); Uphaus v. Wyman, 360 U.S. 72, 79 S. Ct. 1040, 3 L. Ed. 2d 1090 (1959).

10 Church of American Knights of the Ku Klux Klan v. Kerik, 356 F.3d 197 (2d Cir. 2004).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

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(2) Restrictions

(b) Particular Restrictions

§ 590. Guilt by association as discredited doctrine

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1440

Guilt by association is a thoroughly discredited doctrine,[1] and violates the First Amendment.[2] Persons who join an association but who neither subscribe to those of its purposes which are illegal nor participate in those of its activities which are unlawful cannot be condemned merely because some of the members of the association subscribe to certain illegal purposes or participate in certain unlawful activities.[3]

Footnotes

1 Uphaus v. Wyman, 360 U.S. 72, 79 S. Ct. 1040, 3 L. Ed. 2d 1090 (1959).

2 American-Arab Anti-Discrimination Committee v. Reno, 70 F.3d 1045 (9th Cir. 1995).

3 Keyishian v. Board of Regents of University of State of N. Y., 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); Elfbrandt v. Russell, 384 U.S. 11, 86 S. Ct. 1238, 16 L. Ed. 2d 321 (1966); Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964); Cooper v. Henslee, 257 Ark. 963, 522 S.W.2d 391 (1975).

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§ 591. Forced association as generally violative of right to freedom of association

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1440

A corollary of the First Amendment right to associate is the right not to associate;[1] insisting that an organization embrace unwelcome members directly and immediately affects associational rights.[2] However, where a sufficiently compelling state interest, outside the political spectrum, can be accomplished only by requiring individuals to associate together for the common good, then such forced association is constitutional.[3]

Observation:

When the government forces a group to accept for membership someone the group does not welcome and the presence of the unwelcome person affects in a significant way the group's ability to advocate its viewpoint, the government has infringed on the group's First Amendment freedom of expressive association.[4]

Footnotes

1 Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838, 57 A.L.R. Fed. 2d 573 (2010); McLaine v. Lackawanna County, 30 F. Supp. 3d 316 (M.D. Pa. 2014); McDonald v. Grand Traverse County Election Com'n, 255 Mich. App. 674, 662 N.W.2d 804 (2003).

The right to intimate association also implies a right not to associate. Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216 (9th Cir. 2012).

2 Christian Legal Soc. Chapter of the University of California, Hastings College of the Law v. Martinez, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838, 57 A.L.R. Fed. 2d 573 (2010).

3 Lathrop v. Donohue, 367 U.S. 820, 81 S. Ct. 1826, 6 L. Ed. 2d 1191 (1961) (a state supreme court may order integration of the state bar); Railway Emp. Dept. v. Hanson, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed. 1112 (1956) (upholding the validity of the union shop provision of the Railway Labor Act).

The First Amendment right to freedom of association of teachers was not violated by the enforcement of a rule that white teachers whose children did not attend public schools would not be rehired. Cook v. Hudson, 511 F.2d 744 (5th Cir. 1975).

As to compelling public employees to associate with a political party, see § 592.

4 Christian Legal Society v. Walker, 453 F.3d 853, 210 Ed. Law Rep. 916 (7th Cir. 2006).

Requiring the Ku Klux Klan to accept non-“Aryans" as a condition of participating in a state's Adopt-A-Highway program would significantly interfere with its message of racial superiority and segregation in violation of its right of political association. Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000).

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C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

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(2) Restrictions

(b) Particular Restrictions

§ 592. Right of public employees to freedom of association

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1446

A.L.R. Library

First Amendment protection for law enforcement employees subjected to discharge, transfer, or discipline because of speech, 109 A.L.R. Fed. 9

First Amendment protection for judges or government attorneys subjected to discharge, transfer, or discipline because of speech, 108 A.L.R. Fed. 117

First Amendment protection for public hospital or health employees subjected to discharge, transfer, or discipline because of speech, 107 A.L.R. Fed. 21

First Amendment protection for publicly employed firefighters subjected to discharge, transfer, or discipline because of speech, 106 A.L.R. Fed. 396

The right of association must balanced against and may be overridden by the government's interest as an employer in efficiency.[1] Thus, a public employee's First Amendment right of free association, while sacrosanct, is nonetheless subject to reasonable restriction.[2] However, the First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees' freedom to believe and associate or to not believe and not associate.[3] Thus, First Amendment principles prohibit a state from compelling any individual to associate with a political party as a condition of retaining public employment,[4] at least with respect to nonpolicymaking public employees.[5]

Observation:

The elements of a First Amendment claim brought under 42 U.S.C.A. § 1983 in the public employment context are (1) the plaintiff engaged in constitutionally protected speech or association, (2) the defendant took an adverse employment action against the plaintiff, and (3) the plaintiff's speech or association was a substantial or motivating factor for the adverse employment action.[6]

To enjoy protection under the First Amendment, a public employee asserting a free association claim must have engaged in his or her associational activity as a citizen,[7] not as an employee.[8] A public employee bringing a First Amendment freedom of association claim must persuade the court that the association or associational activity at issue touches on a matter of public concern.[9] The more a government employee's association centers around expressive activities relating to matters of public concern, the greater the level of disruption to the workplace the government must show to discipline the employee for association without offending the First Amendment.[10]

Observation:

A public employee's support of a political candidate, as a member of a campaign or in an administration, provides the archetypal political affiliation subject to First Amendment protection.[11]

Practice Tip:

The question of what association touches on matter of a public concern is by necessity a question for case-by-case adjudication.[12]

Footnotes

1 Fraternal Order of Police v. County of Douglas, 270 Neb. 118, 699 N.W.2d 820 (2005), opinion modified on other grounds on denial of reh'g, Fraternal Order of Police, Lodge No. 8 v. County of Douglas, 270 Neb. 469, 745 N.W.2d 883 (2005).

2 Webb v. Carter County Fiscal Court, 165 S.W.3d 490 (Ky. Ct. App. 2005).

3 Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990).

4 Abood v. Detroit Bd. of Ed., 431 U.S. 209, 97 S. Ct. 1782, 52 L. Ed. 2d 261 (1977) (overruled on other grounds by, Janus v. American Federation of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 201 L. Ed. 2d 924 (2018)); Parrish v. Nikolits, 86 F.3d 1088 (11th Cir. 1996).

5 LaRou v. Ridlon, 98 F.3d 659 (1st Cir. 1996); Parrish v. Nikolits, 86 F.3d 1088 (11th Cir. 1996).
The First Amendment insulates public employees who hold nonpolicymaking positions from the vicissitudes of personnel decisions rooted in partisan political concerns. Allman v. Padilla, 979 F. Supp. 2d 205 (D.P.R. 2013).
As to political patronage jobs, see § 605.

6 La Manna v. City of Cornelius, 276 Or. App. 149, 366 P.3d 773 (2016).

7 D'Angelo v. School Bd. of Polk County, Fla., 497 F.3d 1203, 223 Ed. Law Rep. 598 (11th Cir. 2007).

8 Myles v. Richmond County Bd. of Educ., 267 Fed. Appx. 898, 232 Ed. Law Rep. 641 (11th Cir. 2008).

9 Cobb v. Pozzi, 363 F.3d 89 (2d Cir. 2004).

10 Melzer v. Board of Education of City School Dist. of City of New York, 336 F.3d 185, 179 Ed. Law Rep. 32 (2d Cir. 2003).

11 Zavatsky v. O'Brien, 972 F. Supp. 2d 95 (D. Mass. 2013).

12 Akers v. McGinnis, 352 F.3d 1030 (6th Cir. 2003).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(2) Restrictions

(b) Particular Restrictions

§ 593. Probation and parole as affecting freedom of association

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1440, 1452

Probation restrictions may affect the freedom of association if the conditions are primarily designed to meet the ends of rehabilitation and protect the public.[1] A provision of a theft defendant's sentence that prohibits the defendant from having any contact with witnesses or their families for a specified time period does not violate the defendant's constitutional right of free association.[2] Further, a juvenile court, acting in parens patriae, may limit a juvenile's right of association in ways that it arguably could not limit an adult's.[3]

Footnotes

1 Jackson v. State, 821 A.2d 881 (Del. 2003).

2 State v. Malone, 132 Wash. App. 1037, 2006 WL 1064121 (Div. 1 2006) (10 years).

3 In re Byron B., 119 Cal. App. 4th 1013, 14 Cal. Rptr. 3d 805 (4th Dist. 2004).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(2) Restrictions

(b) Particular Restrictions

§ 594. Zoning and other restrictions imposed by law as affecting freedom of association

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1440

A zoning ordinance does not violate the constitutional right to freedom of association if it:[1]

(1) is content-neutral;

(2) is narrowly tailored to serve a legitimate governmental objective; and

(3) leaves open ample channels of alternative means of association.

A zoning ordinance that is narrowly tailored to serve the substantial government interest in efficient land use does not violate the assembly rights of churches to the extent it had an incidental impact on churches by permitting church uses as of right only in residential zones.[2]

A prohibition against polygamy does not violate a defendant's First Amendment right to freedom of association.[3]

Footnotes

1 Great Lakes Soc. v. Georgetown Charter Tp., 281 Mich. App. 396, 761 N.W.2d 371 (2008).

2 Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003).

3 State v. Holm, 2006 UT 31, 137 P.3d 726, 22 A.L.R.6th 665 (Utah 2006) (holding that the right to engage in polygamous behavior was not within the individual liberty protections in the Federal Constitution, and the defendant's right to instrumental association had not been infringed).

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

1. First Amendment Rights Guaranteed by Constitution

e. Freedom of Association

(2) Restrictions

(b) Particular Restrictions

§ 595. Restrictions imposed by private parties as not violative of right of freedom of association

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1440

The First Amendment guarantee of the right of freedom of association does not apply to alleged restrictions imposed by private parties.[1] For example, a collective bargaining agreement requiring all employees to pay full union dues regardless of whether they joined the union does not constitute a "state action" for purposes of an employee's claim that the provision violates his or her First Amendment rights not to associate.[2]

Footnotes

1 Edmondson v. Shearer Lumber Products, 139 Idaho 172, 75 P.3d 733, 7 A.L.R.6th 841 (2003).

2 § 597.

16A Am. Jur. 2d Constitutional Law § 607

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IX. Fundamental Constitutional Rights and Privileges

C. Particular Fundamental Constitutional Rights

2. Life, Liberty, and Pursuit of Happiness

a. In General

§ 607. Life, liberty, and pursuit of happiness as fundamental rights, generally; source of rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Constitutional Law 1065 to 1079

The theory upon which the political institutions and social structure of America rests is that all persons have certain rights of life, liberty, and the pursuit of happiness, which are inalienable,[1] fundamental,[2] and inherent.[3] This principle was, of course, expressly stated in the Declaration of Independence.[4] Personal liberty is a fundamental right.[5] The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.[6] Its protection extends equally to children as well as to adults.[7]

The U.S. Constitution is a charter of negative rather than positive liberties.[8] It provides that neither Congress[9] nor the states[10] may deprive any person of life, liberty, or property without due process of law,[11] and many of the state constitutions contain similar guarantees.[12]

Observation:

Where a state creates liberty interests broader than those protected directly by the Federal Constitution, those procedures mandated to protect federal substantive interests might fail to determine the actual procedural rights and duties of persons within that state.[13]

For purposes of a substantive due process analysis under the federal U.S. Const. Amends. V, XIV concerning the validity of an alleged impairment of a liberty interest, narrow tailoring is required only where fundamental rights are involved; the impairment of a lesser interest demands no more than a reasonable fit between the governmental purpose and the means chosen to advance that purpose.[14]

All fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the states.[15] A person's liberty also is protected by the Due Process Clause, even when the liberty itself is a statutory creation of a state.[16] Thus, a liberty interest protected by the 14th Amendment's Due Process Clause may arise from the Constitution itself by reason of guarantees implicit in the word "liberty," or it may arise from an expectation or interest created by state laws or policies.[17] Additionally, in the absence of special legislation, Native Americans, like other citizens, are embraced by the protection against an unwarranted intrusion on personal liberty.[18]

The test to measure the validity of a state statute under the Due Process Clause of the 14th Amendment is whether the statute is contrary to the fundamental principles of liberty and justice.[19] Application of the broad restraints of due process compels inquiry into the nature of the demand being made upon individual freedom in a particular context and the justification of social need on which the demand rests.[20] The Due Process Clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive an individual.[21]

Footnotes

1 Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, 49 L. Ed. 2d 451 (1976) (holding that a "liberty interest" may have either of two sources: it may originate in the U.S. Constitution or it may have its roots in state law).

2 In re Roger S., 19 Cal. 3d 921, 141 Cal. Rptr. 298, 569 P.2d 1286 (1977); Shavers v. Duval County, 73 So. 2d 684 (Fla. 1954).

3 Thiede v. Town of Scandia Valley, 217 Minn. 218, 14 N.W.2d 400 (1944).

4 "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

5 People v. Applin, 40 Cal. App. 4th 404, 46 Cal. Rptr. 2d 862 (5th Dist. 1995).
The right to personal security constitutes historic liberty interest protected substantively by the due process clause. Johnson ex rel. Cano v. Homes, 377 F. Supp. 2d 1039 (D.N.M. 2004), aff'd, 455 F.3d 1133 (10th Cir. 2006).

6 Startzell v. City of Philadelphia, Pennsylvania, 533 F.3d 183 (3d Cir. 2008).

7 In Interest of S.H., 204 Ga. App. 135, 418 S.E.2d 454 (1992).

8 Rogers v. City of Port Huron, 833 F. Supp. 1212 (E.D. Mich. 1993).

9 U.S. Const. Amend. V.

10 U.S. Const. Amend. XIV.
The interests comprehended within the meaning of "liberty" (or "property") under the procedural guarantees of the Due Process Clause of the 14th Amendment include interests that are recognized and protected by state law as well as interests guaranteed in one of the provisions of the Bill of Rights which have been

"incorporated" into the 14th Amendment. Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).

11 §§ 933 to 937, discussing due process, generally.

12 Ex parte Guthrie, 689 So. 2d 951 (Ala. 1997) (noting, however, that the imposition and affirmance of the defendant's death sentence for capital murder did not violate the right to life proclaimed in the Alabama Constitution; the provision in question does not prohibit the state from establishing that certain criminal acts are so heinous as to warrant forfeiture of a convicted defendant's life).

13 Mills v. Rogers, 457 U.S. 291, 102 S. Ct. 2442, 73 L. Ed. 2d 16 (1982).

14 Reno v. Flores, 507 U.S. 292, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).

15 Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014).

16 Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

17 Wilkinson v. Austin, 545 U.S. 209, 125 S. Ct. 2384, 162 L. Ed. 2d 174 (2005); Kretchmar v. Federal Bureau of Investigation, 32 F. Supp. 3d 49 (D.D.C. 2014), aff'd, (D.C. Circ. 14-5178) (Jan. 16, 2015).

18 Duro v. Reina, 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990).

19 Petition of Groban, 352 U.S. 330, 77 S. Ct. 510, 1 L. Ed. 2d 376, 76 Ohio L. Abs. 368 (1957); Cummings v. X-Ray Associates of New Mexico, P.C., 1996-NMSC-035, 121 N.M. 821, 918 P.2d 1321 (1996).

20 Frank v. State of Md., 359 U.S. 360, 79 S. Ct. 804, 3 L. Ed. 2d 877 (1959) (overruled in part on other grounds by, Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)).

21 Johnson ex rel. Cano v. Homes, 377 F. Supp. 2d 1039 (D.N.M. 2004), aff'd, 455 F.3d 1133 (10th Cir. 2006).

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